(12) (12)

Nos. 08-1553 & 08-1554

IN THE

Supreme Court of the United States

KAWASAKI KISEN KAISHA, LTD. AND "K" LINE AMERICA, INC.,

AND

UNION PACIFIC RAILROAD COMPANY,

Petitioners,

v.

REGAL-BELOIT CORPORATION, VICTORY FIREWORKS, INC., PICC PROPERTY & CASUALTY CO. LTD., AND ROYAL & SUN ALLIANCE INSURANCE CO., LTD.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Does the Carmack Amendment apply to the inland carriage of goods under a multimodal through bill of lading in the absence of a separate inland bill of lading?

2. Does the Carmack Amendment, 49 U.S.C. § 11706, apply to rail transportation in the United States that is part of a multimodal shipment originating in a foreign country when the Carmack Amendment's scope is coextensive with the jurisdiction of the Surface Transportation Board ("Board"), and the Board has jurisdiction over the domestic rail leg of transportation "between a place in . . . the United States and a place in a foreign country," *id.* § 10501(a)(1)-(2)(F)?

3. Can a rail carrier providing "exempt" transportation rely on 49 U.S.C. § 10709 to avoid its obligation to comply with the Carmack Amendment when the Board's exemption of that transportation from the provisions of subtitle IV of Title 49 includes § 10709?

4. Did the court of appeals properly remand these cases to the district court to determine whether petitioners offered the shippers a fair opportunity to choose Carmack-compliant venue terms when the record reveals no evidence that such an opportunity was afforded the shippers?

5. Did the court below properly employ a fact-specific and functional analysis to conclude that the Carmack Amendment applies to petitioner K-Line, which held itself out as a rail carrier, contracted with the shippers to provide transportation to inland destinations in the United States, and discharged that obligation by providing its own multimodal containers and subcontracting with petitioner Union Pacific for rail transportation?

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, Regal-Beloit Corporation, Victory Fireworks, Inc., PICC Property & Casualty Co. Ltd., and Royal & Sun Alliance Insurance Co., Ltd. state the following:

Regal-Beloit Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

Victory Fireworks, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

The People's Insurance Company (Group) of China owns more than 10% of the stock of PICC Property & Casualty Co. Ltd.

RSA Insurance Group plc is the ultimate parent corporation of Royal & Sun Alliance Insurance Co., Ltd.

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INTRODUCTION

These cases concern the proper forum for suits over damage to cargo for delivery to U.S. purchasers caused by a U.S. railroad's train derailment in Oklahoma on the inland domestic leg of an international multimodal shipment. Ever since the advent of the train, suits over cargo loss or damage from derailments have been litigated routinely in U.S. courts. Despite its own rail circular calling for suit to be brought in the United States, petitioner Union Pacific Railroad Company ("Union Pacific") joins an argument first made by the ocean carrier, petitioners Kawasaki Kisen Kaisha, Ltd. and "K" Line America, Inc. (collectively, "K-Line"). They both now contend that these suits must be litigated in Tokyo, Japan, based on contractual provisions in the ocean carrier's bills of lading.

More than a century ago, after decades of similar contractual efforts by railroads to evade their culpability for damaging property they were entrusted to carry, Congress enacted the Carmack Amendment to provide a uniform national regime governing rail carriers' liability for damage to cargo in the United States and to protect cargo owners from abuses by those carriers. As subsequently amended, the Carmack Amendment specifies particular venues in which cargo claimants may bring suit and does not permit carriers to impose forum-selection clauses requiring claimants to file actions in other locations. *See* 49 U.S.C. § 11706(d)(2).

In these cases, petitioners seek to establish that the Carmack Amendment does not apply to domestic rail shipments that are part of international, multimodal carriage. Thus, they would force respondents to travel to Japan to recover for losses caused by

Union Pacific's negligence in the United States. If the Court adopts petitioners' position, multimodal rail transportation such as the carriage at issue here would be unregulated, and owners of cargo damaged in the United States would be shut out of this Nation's courts. The result would be that owners of cargo carried in entirely domestic shipments would be protected by federal statute, but owners of cargo on an overseas shipment would have no federal statutory protection during the period when their goods are carried domestically, even if both sets of goods travel together on the same train or truck and the owners of the damaged cargo are all U.S. citizens. Petitioners offer no evidence that Congress enacted such an absurd regime.

Nor does Union Pacific acknowledge to this Court that, as a leading member of the Association of American Railroads ("AAR"), it pressed the Department of State and the international community to adopt *the exact opposite rule from the one it advocates here*. In international negotiations to establish a new set of internationally uniform rules, the railroads argued strenuously for applying each nation's domestic statute to rail or road carriage within that country. Now, Union Pacific seeks to have a nationally uniform statutory rule in the United States replaced by a court-sanctioned, unregulated contractual regime, in which cargo claimants would never be protected in the formation of contracts of carriage and would be forced to litigate domestic disputes in far-distant countries.

On the threshold issue here — the applicability of the Carmack Amendment's venue provisions — petitioners' gambit to revolutionize the venue rules for suits arising out of domestic rail transportation can-

not withstand scrutiny of the congressionally enacted statutory text. The Carmack Amendment applies to *any* "rail carrier providing transportation or service subject to the jurisdiction of the" Surface Transportation Board ("STB" or "Board"). 49 U.S.C. § 11706(a). The Board has jurisdiction "over transportation by rail carrier . . . between a place in . . . the United States and a place in a foreign country" to the extent the "transportation [is] in the United States." *Id.* § 10501(a)(1)-(2)(F). Therefore, because the transportation in these cases was from various ports in China (each "a place in a foreign country") to destinations "in . . . the United States," the Board has jurisdiction over the domestic portion of the transportation and the Carmack Amendment applies, as the Ninth Circuit correctly held. Petitioners' contrary contention requires this Court to apply "The Pre-1978 Statutory Language," as Union Pacific openly admits. U.P. Br. 20. Under the current statutory language, which the Court is bound to apply, petitioners cannot prevail.

Petitioners do not dispute that, if the Carmack Amendment governs, the contractual provisions that require respondents to bring these suits in Japan violate Carmack's venue provisions, 49 U.S.C. § 11706(d). Union Pacific asserts, however, that the Carmack Amendment also does not apply because its circular (formerly considered a tariff) claims to be governed by 49 U.S.C. § 10709, which permits rail carriers in certain circumstances to make alternate contractual arrangements for carriage. But, as the United States' brief explains, the STB has exempted the transportation at issue in these cases from § 10709, and Union Pacific therefore cannot rely on that provision.

Union Pacific further maintains that, even if the Carmack Amendment applies, it complied with Carmack and 49 U.S.C. § 10502(e) by offering Carmack-compliant forum terms to *K-Line*. But the statute requires such terms to be offered to the *shipper*, which petitioners cannot claim to have done. Union Pacific did not offer even K-Line an opportunity to select Carmack-compliant terms. Instead, Union Pacific's circular states that "Carmack liability coverage is **not** available for any Shipments that originate outside the borders of the United States of America." JA133.

Contrary to petitioners' assertions, these cases are far afield from *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004). Unlike the uniformity this Court embraced in *Kirby*, petitioners' approach would produce the anomalous situation that train derailments in the United States would spawn litigation in multiple foreign forums (if the stakes could justify the expense) under a variety of different liability regimes even for the U.S. cargo interests that sustained the loss.

STATEMENT

I. STATUTORY BACKGROUND

A. Regulation Of Land Transportation

1. Legislative background

In 1887, Congress enacted the Interstate Commerce Act ("ICA"). *See* Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 (subsequently codified as amended at 49 U.S.C. § 1 *et seq.* (1926) (recodified in 1978)). Before that time, domestic rail carriers had wide-ranging freedom of contract and could exercise their market power to impose arbitrary rates and terms on shippers. Additionally, rail carriers frequently discrimi-

nated against disfavored shippers or shipping markets by offering them less favorable rates and terms, while granting preferential service to other customers or markets. The ICA sought to curb those abuses by creating both uniformity and reasonableness in the rates, regulations, and terms for rail carriage in the United States.

As originally enacted, the ICA did not displace state law governing carriers' liability for injury or loss. *See Pennsylvania R.R. Co. v. Hughes*, 191 U.S. 477, 491 (1903). Rail carriers continued to accept shipments for carriage on multiple lines and to refuse liability for any portion of the journey that occurred on another carrier's line. That practice compelled a shipper "to make with each carrier in the route over which his package must go a separate agreement limiting the carrier liability of each separate company to its own part of the through route." *Atlantic Coast Line R.R. Co. v. Riverside Mills*, 219 U.S. 186, 199-200 (1911).

In 1906, Congress broadened the ICA's scope by enacting the Hepburn Act. *See* Act of June 29, 1906, ch. 3591, 34 Stat. 584. Section 7 of the Hepburn Act, popularly known as the Carmack Amendment, established uniform national rules governing liability of rail carriers. The purpose of the Carmack Amendment's liability regime was "to relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling . . . goods." *Reider v. Thompson*, 339 U.S. 113, 119 (1950). The Carmack Amendment created in the initial carrier unity of responsibility for the transportation of goods to their destination. *See Missouri, K. & T. Ry. Co. of Texas v. Ward*, 244 U.S. 383, 386 (1917). The initial carrier assumed that legal duty

"in spite of any contract, receipt, rule, or regulation which the carrier may impose in the bill of lading." 40 Cong. Rec. 9583 (1906) (statement of Rep. Bartlett). As one representative noted, "the initial carrier has a through-route connection with the secondary carrier, on whose route the loss occurred, and a settlement between them will be an easy matter, while the shipper would be at heavy expense in the institution of a suit." *Id.* at 9580 (statement of Rep. Richardson). By instituting that legal regime, Congress deliberately shifted an important burden from the shipper to the carrier and guaranteed the shipper a remedy against the carrier to which it had delivered the goods.

In 1913, this Court interpreted the original version of the Carmack Amendment to preserve carriers' common-law ability to offer shippers a lower rate in exchange for limiting their liability to a value declared in the bill of lading. *See Adams Express Co. v. Croninger*, 226 U.S. 491, 510-12 (1913). Two years later, Congress passed the First Cummins Amendment and provided that "any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any . . . bill of lading, or in any contract, rule, regulation, or in any tariff . . . is hereby declared to be unlawful and void." Act of Mar. 4, 1915, ch. 176, § 1, 38 Stat. 1196, 1197. The First Cummins Amendment also extended the Carmack Amendment, which previously had applied only to interstate carriage, to govern transportation between the United States and its territories and to transportation from the United States to an adjacent foreign country. *See id.*

In 1916, Congress retreated from the First Cummins Amendment's absolute prohibition on limited

liability when it passed the Second Cummins Amendment. *See* Act of Aug. 9, 1916, ch. 301, 39 Stat. 441. That statute supplemented the 1915 enactment with the proviso that it would not apply to "property . . . received for transportation concerning which the carrier shall have been . . . expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property." *Id.*, 39 Stat. 442. Carriers thus resumed their common-law ability to limit damages to a value declared by the shipper in exchange for a lower rate — albeit contingent on Interstate Commerce Commission ("ICC") authorization.

In 1978, Congress revised and recodified the ICA as subtitle IV of Title 49 of the United States Code. Congress maintained the substance of the Carmack Amendment, preserving its imposition of liability on multiple carriers handling a shipment and the ability of carriers to limit that liability in narrow, specified circumstances.

Congress made two changes to the scope of the Carmack Amendment, however. First, it clarified that the Amendment applies to both imports and exports. The version of the Carmack Amendment in force between 1915 and 1978 on its face applied only to international shipments "*from* any point in the United States *to* a point in an adjacent foreign country." 49 U.S.C. § 20(11) (1976) (emphases added). The recodified version replaced the "from . . . to" language with the word "between," clarifying that the Carmack Amendment applied to both exports and imports. *Id.* § 10521(a)(1) (Supp. II 1978). That linguistic clarification produced no substantive

change, however, as this Court had interpreted the prior language to include both imports and exports. *See Galveston, H. & S.A. Ry. Co. v. Woodbury*, 254 U.S. 357, 359 (1920) (explaining that a "carrier engaged in transportation by rail *to* an adjacent foreign country is, at least ordinarily, engaged in transportation also *from* that country to the United States").

Second, the 1978 recodification removed the limitation of the Carmack Amendment's applicability to shipments to or from *adjacent* foreign countries. *Compare* 49 U.S.C. § 10521(a)(1)(E) (Supp. II 1978) ("between a place in . . . (E) the United States and a place in a foreign country") *with id.* § 20(11) (1976) ("from any point in the United States to a point in an *adjacent* foreign country") (emphasis added).

In 1980, Congress significantly altered the regulation of the American rail industry by passing the Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895. Among other deregulatory provisions, the Staggers Rail Act gave the ICC broad authority to exempt persons, classes of persons, transactions, or services from most statutory provisions if it found that application of those provisions was unnecessary to serve the goals set out by Congress. *See id.* § 213, 94 Stat. 1912-13. But it placed an important limitation on that exemption authority, specifying that the ICC could not exempt rail carriers from the obligation to offer shippers terms for liability and claims that were consistent with the Carmack Amendment's requirements. *See id.* Congress also strengthened those requirements by adding an exclusive-venue provision to the Carmack Amendment that limited the jurisdictions where a civil action for cargo damage could be brought. *See id.* § 211(c), 94 Stat. 1911.

Finally, a 1995 statute produced the current version of the Carmack Amendment. Congress enacted the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 ("ICCTA"), which abolished the ICC and transferred its responsibilities to the Department of Transportation. In 1996, the STB replaced the ICC as the regulator of rail carriers.

2. Current statute

Currently, the Carmack Amendment provides that a receiving rail carrier and a delivering rail carrier are liable "for the actual loss or injury to the property caused by . . . (1) the receiving rail carrier; (2) the delivering rail carrier; or (3) another rail carrier over whose line or route the property is transported in the United States." 49 U.S.C. § 11706(a). A carrier held liable is "entitled to recover from the rail carrier over whose line or route the loss or injury occurred." *Id.* § 11706(b). The Carmack Amendment prohibits carriers from contracting to limit liability except in the same narrow circumstances allowed under the Second Cummins Amendment. *See id.* § 11706(c)(3)(A) (permitting a rail carrier to "establish rates for transportation of property under which [its liability] is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier").

Finally, and most relevant to the current dispute, the Carmack Amendment specifies the exclusive venues for any civil action seeking recovery against a carrier for damage to cargo. Suit must be brought

> (i) against the originating rail carrier, in the judicial district in which the point of origin is located;
>
> (ii) against the delivering rail carrier, in the judicial district in which the principal place of

> business of the person bringing the action is located if the delivering carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and
>
> (iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

Id. § 11706(d)(2)(A).

B. Regulation Of Sea Transportation

Following World War I, the international community adopted the "Hague Rules," a multinational convention establishing a set of uniform rules relating to international carriage of goods by sea. The United States both ratified the Hague Rules and enacted the Carriage of Goods by Sea Act, ch. 229, 49 Stat. 1207 (1936) (*reprinted at* 46 U.S.C. § 30701 note) ("COGSA"), which is based on the Hague Rules. COGSA governs the carriage of goods "between the ports of the United States and ports of foreign countries," COGSA § 1(e), from "the time when the goods are loaded on to the time when they are discharged from the ship," *id.* § 13 — known to the shipping community as the "tackle-to-tackle" period. Although COGSA does not prevent the shipper and carrier from agreeing to other terms for the periods prior to the goods being loaded on the ship or after their discharge from the ship, *see id.* § 7, that right is subject to "any other law" regarding "the duties, responsibilities, and liabilities of the ship or carrier" during those "beyond the tackle" periods, *id.* § 12.

II. FACTUAL BACKGROUND

A. K-Line And Union Pacific

Petitioner (defendant below) Kawasaki Kisen Kaisha, Ltd. operates as a common carrier transporting cargo in containers designed to be carried on ocean vessels, barges, rail cars, or trucks. *See* K-Line Br. 8. Together with its wholly owned domestic subsidiary, petitioner (defendant below) "K" Line America, Inc. (collectively, "K-Line"), it sells multimodal transportation services — shipments that include both ocean and land carriage portions — for containerized cargo. *See id.* at 9-10. K-Line advertises itself as a "[s]pecialist[] in vessel, ocean terminal, and double-stack train operations and movement" and touts its "far reaching infrastructure of vessels, terminals, double-stack trains and containers all dedicated to providing a full range of transportation services." "K" Line America, Inc., http://www.k-line.com (last visited Feb. 9, 2010).

K-Line, as a vessel-operating common carrier, operates the ocean transport component of its services and provides the multimodal containers in which the cargo is packed.[1] Because it does not operate any rail lines between the West Coast ports

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[1] *See* K-Line Br. 8-9; *see also* Kawasaki Kisen Kaisha, Ltd. Combined Transport: Bill of Lading ("K-Line BOL") Terms, Import — Back, clause 10 (describing "Carrier's Container" and apportioning liability for damage to containers), *reprinted in* Appellants' Excerpts of Record, Tab 50, at 5, Case No. 06-56831 (9th Cir. filed July 2, 2007) ("C.A.E.R."). A more legible copy of the relevant version of the K-Line BOL is available at http://web.archive.org/web/20050209063158/www.kline.com/BL_Terms/BLTerms IMPBLBack.asp (last visited Feb. 12, 2010). K-Line's current bill of lading is identical in all relevant respects and is available at http://www.kline.com/KAMBL_Terms/BL_Terms_Import_Back_Clauses.asp (last visited Feb. 12, 2010).

where its ocean vessels dock and the inland areas of the United States, K-Line subcontracts with railroads to provide the inland portion of its multimodal transportation services. Thus, K-Line entered into a long-term agreement with petitioner (defendant below) Union Pacific Railroad Co. ("Union Pacific"). *See* K-Line Br. 11. Under that agreement, known as the Exempt Rail Transportation Agreement ("ERTA"), K-Line agreed to tender at least 95% of its containerized multimodal traffic to Union Pacific. JA120 (ERTA § 2). K-Line agreed to furnish the multimodal containers and chassis, with Union Pacific providing the railcars and locomotives. JA121 (ERTA § 14(G)(1)-(2)). K-Line further agreed to pay Union Pacific a flat, per-container rate specified in the contract. *Id.* (ERTA § 5).

The ERTA, which functioned mainly as a volume and pricing contract, was not the only document governing the relationship between K-Line and Union Pacific. The railroad's Master Intermodal Transportation Agreement ("MITA") sets out additional terms and conditions that apply to all multimodal transportation handled by Union Pacific, including services provided under Union Pacific's ERTA agreement with K-Line. JA123-24. Among other terms, the MITA establishes the liability regime for multimodal services provided by Union Pacific. It sets Union Pacific's maximum liability for cargo loss or damage at the lesser of the cargo's origin value or $250,000. JA132 (MITA § 3.1(C)(3)). It also incorporates "any limitation on the value of claims imposed by any other rail carriers, motor carrier, marine carrier or freight forwarder" and states that "the value of the lowest maximum claim amount shall apply." *Id.*

The MITA also sets out the terms by which shippers can claim Carmack Amendment protections. But it declares plainly that "Carmack liability coverage is **not** available for any Shipments that originate outside the borders of the United States of America." JA133 (MITA § 3.2(D)). Finally, the MITA mandates that "[a]ll lawsuits for freight loss or damage must be filed in a court of competent jurisdiction in Omaha, Douglas County, Nebraska." JA134 (MITA § 3.3).

B. Respondents' Shipments

K-Line receives cargo shipments pursuant to service contracts that it executes with companies that ship goods. *E.g.*, JA183. Under those contracts, the shipper agrees to ship a certain number of cargo containers on K-Line's vessels. JA188 (§ IV).

In March and April 2005, respondents (plaintiffs below) or their subrogors[2] purchased cargo from shippers that had entered into service contracts with K-Line. Regal-Beloit, plaintiff in the lead case, purchased a cargo of electric motors to be shipped from Shanghai, China, to Indianapolis, Indiana. JA137-40. Plaintiff Victory Fireworks purchased a cargo of fireworks to be shipped from Beihai, China, to Minneapolis, Minnesota. JA160-62, 171. Marathon Electric, the subrogor of plaintiff PICC, purchased a cargo of electric motor parts to be shipped from Shanghai, China, to Milwaukee, Wisconsin. JA148-51. And United Steel & Fasteners, the subrogor of plaintiff Royal & Sun, purchased a cargo of retainer

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[2] Respondents PICC and Royal & Sun are the subrogated insurers of two consignees that purchased shipments of cargo destroyed when Union Pacific's train derailed. Under their insurance agreements, those insurer respondents paid the losses that the consignees suffered. They accordingly succeeded to the consignees' rights against petitioners.

nail castings to be shipped from Zhangjiagang, China, to Chicago, Illinois. JA172-75.

The shippers in China loaded each cargo into multimodal containers supplied by K-Line and transferred the containers back to K-Line. JA117-18. (A "multimodal" container is one that can be transported by ocean vessel, railroad, or truck; the benefit of multimodal containers is that the contents need not be unloaded at any point during the shipment.) K-Line issued a bill of lading for each shipment. "A bill of lading is a contract that 'records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract for carriage.'" Pet. App. 5a n.3.[3] These bills of lading were "through bills," meaning that they covered the entire shipment from China to the inland U.S. destinations — not simply the part of the journey that would take place on K-Line's ocean vessels — and reflected K-Line's assumption of responsibility for the cargo throughout the entire route. *E.g.*, JA137-47 (through bill of lading for Regal-Beloit shipment). The bills of lading identified respondents (or, in the case of insurer respondents, their subrogors) as the "consignees" of the shipments. *E.g.*, JA137 (identifying Marathon Electric, a Regal-Beloit company, as "consignee" of the shipment). Each consignee assumed the risk of loss or damage to the cargo (vis-à-vis the Chinese sellers of the goods) when the cargo was loaded onto K-Line's vessels.

The bills of lading included several provisions that are relevant to this dispute. First, a "Governing Law and Jurisdiction" clause stated that "[t]he contract evidenced by or contained in this Bill of Lading shall

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[3] References to "Pet. App." are to the petition appendix filed in No. 08-1553.

be governed by Japanese law except as may be otherwise provided for herein." JA144. It further stated that any action in connection with the carriage of goods "shall be brought before the Tokyo District Court in Japan, to whose jurisdiction Merchant irrevocably consents." *Id.* Next, a provision known as a "Clause Paramount" stated that, "[w]ith respect to Goods shipped to, from or through US Territories, Carrier's responsibilities during the entire period (and not just during Water Carriage) from the time of receipt of Goods to the time of delivery of Goods shall be governed by the United States Carriage of Goods by Sea Act (US COGSA)." *Id.* By contrast, for shipments to countries other than the United States, K-Line's responsibility for damage outside the water carriage period would be governed by "any relevant provisions contained in any . . . national law" that would have applied had the cargo owners "made a separate and direct contract" for that stage of the carriage. C.A.E.R., Tab 50, at 5; *see also* K-Line BOL clause 3(B). The bills of lading also entitled K-Line "to sub-contract on any terms whatsoever Carriage . . . undertaken by Carrier in relation to Goods by . . . any Connecting Carrier." JA145. Finally, a provision known as a "Himalaya Clause" stated that any connecting carrier subcontractor "shall have the benefit of all provisions herein benefiting Carrier as if such provisions were expressly for their benefit." *Id.*

Under those bills of lading, K-Line carried all four shipments by ocean vessel from China to the port of Long Beach, California. There, the containers were unloaded from the ocean vessels and transferred onto rail cars pulled by Union Pacific locomotives and

bound for the midwestern United States. JA118.[4] The containers did not reach their destinations, however, because Union Pacific's train derailed outside of Tyrone, Oklahoma, on April 21, 2005. *Id.* The cargo was destroyed.

III. PROCEDURAL HISTORY

Following the derailment, in April 2006 each plaintiff separately filed suit against K-Line and Union Pacific in California Superior Court. Regal-Beloit sought $100,000 in damages, JA58; Victory Fireworks sought $40,893.70, JA45; PICC sought $12,524.07, JA51; and Royal & Sun sought $3,012, JA64.

Union Pacific removed each case to the United States District Court for the Central District of California. *E.g.*, JA65 (Regal-Beloit case removal notice). It asserted federal jurisdiction in part based on the Carmack Amendment. JA67.

Following removal, Union Pacific sought to transfer the consolidated cases to the United States District Court for the Southern District of New York. JA72-73. Its transfer motion relied on a choice-of-law clause in the contract between Union Pacific and K-Line, which specified that New York law would govern a cross-claim that the railroad had asserted against the ocean carrier. JA75-76. Union Pacific's motion further relied on the fact that nine other cases arising out of the Tyrone derailment were pending in the Southern District of New York, as well as the fact that most of the witnesses were located in states closer to New York than to California. JA80-81, 101 (listing 32 witnesses in the United States, 4 witnesses

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[4] The record does not reveal which company's representatives and equipment were used to unload the containers from the ship and place them on the rail cars.

in China, and no others). Respondents and K-Line opposed the motion. JA17 (docket entries 58-59). The district court denied transfer. JA20 (docket entry 76). It held that the Carmack Amendment provided exclusive venue in California, Illinois, Indiana, Oklahoma, Minnesota, or Wisconsin. *See* Order Denying Motion To Transfer Venue at 4, Case No. CV-06-03016 (C.D. Cal. Sept. 29, 2006).

Meanwhile, after Union Pacific had filed its transfer motion, K-Line moved to dismiss the complaints based on the forum-selection clause in its bills of lading, which required suits to be brought in Japan. *See supra* pp. 14-15, 16; JA14 (docket entry 46). Union Pacific subsequently joined in K-Line's motion. JA15-16 (docket entry 54).

The district court granted that motion and dismissed the consolidated cases. Pet. App. 47a. The court first held that the Japan forum-selection clause applied to respondents' claims because they alleged breach of the bills of lading. *Id.* at 42a. It next held that the Himalaya Clause allowed Union Pacific to claim the benefit of the forum-selection clause. *Id.* at 42a-43a. Finally, the court held that the Carmack Amendment's exclusive-venue provision did not bar enforcement of the forum-selection clause. The court reasoned that COGSA, which does not limit venue, covered the overseas leg of the shipments at issue. *Id.* at 45a. And, although the Carmack Amendment ordinarily would apply to the inland rail portion of the shipments, the court found that the bills of lading were contracts under 49 U.S.C. § 10709, which allows parties to agree to a venue not specified by the Carmack Amendment. *Id.* at 46a; 49 U.S.C. § 10709(c)(2) ("The exclusive remedy for any alleged breach of a contract entered into under this section

shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree.").

Respondents appealed to the Ninth Circuit, which reversed the district court's order of dismissal and remanded the cases for further proceedings.

The court first rejected K-Line's argument that it was not a "rail carrier" and therefore could not be subject to the Carmack Amendment. A "rail carrier" includes "a person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). "Railroad" transportation, in turn, includes not only railroad tracks and facilities but "intermodal equipment used by or in connection with a railroad." *Id.* § 10102(6)(A). Additionally, the court explained that "the Board's jurisdiction, which is coextensive with Carmack's coverage, includes 'transportation that is by railroad and water, *when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.*'" Pet. App. 12a (quoting 49 U.S.C. § 10501(a)(1)(B)) (emphasis in original). Because K-Line transported the cargo under through bills of lading covering the entire journey and arranged for continuous carriage by subcontracting with Union Pacific, the court found that it met the statutory definition of a "rail carrier" under the Carmack Amendment. *Id.* at 13a.

The Ninth Circuit next rejected petitioners' argument that the Carmack Amendment cannot apply to a shipment from a foreign country into the United States under a through bill of lading. Ninth Circuit precedent expressly foreclosed that contention. *See id.* at 17a-18a (citing *Neptune Orient Lines, Ltd. v. Burlington N. & S.F. Ry. Co.*, 213 F.3d 1118, 1119 (9th Cir. 2000)). And the court refused to accept the

alternative argument that the purported extension of COGSA in the bills of lading to cover the inland route could trump the Carmack Amendment's application. The court reasoned that, although COGSA permits contractual extensions "beyond the tackles" to the inland portions of a shipment, COGSA does not say that such extensions take precedence over other federal statutes. *Id.* at 21a, 23a.

Having concluded that the Carmack Amendment — and therefore its venue provision — applied, the Ninth Circuit next addressed whether K-Line and Union Pacific could nonetheless contract for alternative terms under § 10709, as the district court held. It rejected petitioners' arguments. *Id.* at 26a-27a. The parties did not dispute that the STB has exempted multimodal shipments like those at issue here from most regulatory burdens, including rate regulation. *See* 49 C.F.R. § 1090.2. Because that exemption includes § 10709, the court of appeals concluded that carriers of exempt multimodal shipments, such as petitioners, cannot enter into a contract under § 10709. Pet. App. 32a.

The Ninth Circuit also explained that the STB's exemption does not relieve carriers of their obligations under the Carmack Amendment. *Id.* at 28a (STB not authorized to "'relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706,'" *i.e.*, the Carmack Amendment) (quoting 49 U.S.C. § 10502(e)). At the same time, however, the Board may not "prevent rail carriers from offering alternative terms." 49 U.S.C. § 10502(e). The Ninth Circuit read those two clauses of § 10502(e) to mean that "carriers providing exempt transportation are obliged to provide terms consis-

tent with Carmack's venue and liability protections to their shipper customers, but are ultimately free to contract for terms different from those in § 11706." Pet. App. 28a.

The Ninth Circuit remanded the consolidated cases to the district court to determine whether K-Line and Union Pacific had offered terms consistent with the Carmack Amendment before contracting for inconsistent terms. *Id.* at 34a-35a. It found the existing factual record insufficiently developed to answer that question. *Id.*

SUMMARY OF ARGUMENT

I. At the threshold, these cases concern whether the Carmack Amendment applies to the rail transportation during which Union Pacific's negligence destroyed respondents' cargo. The statute's plain language permits only one answer: it does. The Carmack Amendment applies to any "rail carrier providing transportation or service subject to the jurisdiction of the [STB]." 49 U.S.C. § 11706(a). The Board has jurisdiction "over transportation by rail carrier . . . in the United States between a place in . . . the United States and a place in a foreign country." *Id.* § 10501(a)(1)-(2)(F). Respondents' cargo was transported from ports in China (each "a place in a foreign country") to "place[s] in . . . the United States." By the statute's plain terms, therefore, the Carmack Amendment applies, as the Ninth Circuit correctly held.

Petitioners sought this Court's review to resolve an asserted circuit conflict over whether the Carmack Amendment applies to international through shipments absent a separate bill of lading covering the domestic inland leg. They have now essentially abandoned that issue, and properly so. The statutory

text contains no separate-bill-of-lading requirement. Indeed, the Carmack Amendment expressly provides that "[f]ailure to issue a receipt or bill of lading does not affect the liability of a rail carrier." *Id.* § 11706(a).

Petitioners' other arguments for why the Carmack Amendment does not apply lack merit (and involve no circuit conflict). Petitioners' assertions cannot be squared with the statutory text in force now and when Union Pacific's train derailed. Indeed, neither petitioner musters *any* argument based on that statutory text. Instead, they ask this Court to adopt "The Pre-1978 Statutory Language." U.P. Br. 20. But this Court must apply the congressionally enacted statute as it currently exists, not obsolete statutory language replaced decades ago.

In seeking to substitute a prior version of the statute for the current language, petitioners place great weight on the presumption that, when Congress recodifies a statute, it does not intend to change the statute's meaning. But, while that presumption may be a useful guide when statutory language is ambiguous, it cannot defeat the plain meaning of unambiguous statutory text. The governing statutory language contains no ambiguity, as petitioners implicitly concede by failing to offer an argument based on that language. Further, the current statutory provision was not part of a recodification, so the presumption on which petitioners rely is inapplicable in any event.

K-Line seeks to conjure up a conflict between the Carmack Amendment and another federal statute, COGSA, to obscure what is at stake in these cases: a choice between a federal statute that confers a U.S. forum and an unregulated contract asserting a for-

eign forum for cases arising from a U.S. train wreck. COGSA, however, does not apply to inland transportation, such as the rail transportation in these cases. To be sure, COGSA § 7 preserves a limited ability to apply liability terms agreed by the parties to inland transportation. But a contractual extension of COGSA's terms does not give them the force of statutory law. Furthermore, COGSA itself provides in § 12 that a contractual extension of COGSA inland must yield to "any other law which would be applicable in the absence of [COGSA]" – such as the Carmack Amendment. Petitioners neither cite COGSA § 12 nor explain why it does not fully refute their argument.

II. Petitioners do not dispute that, if the Carmack Amendment applies, the contractual provision that requires respondents to bring these suits in Japan violates the Carmack Amendment's venue provisions, 49 U.S.C. § 11706(d). *See, e.g.*, K-Line Br. 17 (admitting that "the Carmack Amendment . . . does not permit forum selection clauses"). Union Pacific argues, however, that the Carmack Amendment does not apply because its contract is governed by 49 U.S.C. § 10709. But, as the United States' brief explains, the STB has exempted the transportation at issue in these cases from § 10709. Union Pacific therefore cannot rely on that provision.

Union Pacific also contends that it complied with the Carmack Amendment and 49 U.S.C. § 10502(e) by offering Carmack-compliant forum terms to *K-Line*. But the statute requires such terms to be offered *to the shipper*. Here, there is no evidence that anyone offered the shippers contracts that either did not contain forum-selection clauses or contained forum terms that comply with the Carmack Amendment.

K-Line argues that its contracts with the shippers allowed it to subcontract for rail transportation on any terms, but (even if true) that does not establish the shippers were offered an opportunity to obtain rail transportation on Carmack-compliant terms.

In any event, Union Pacific did not offer even K-Line an opportunity to select Carmack-compliant terms. The forum-selection clause in the contract between Union Pacific and K-Line requires suit to be brought in Nebraska, which is not a forum identified by the Carmack Amendment. Further, that same agreement asserts that Carmack Amendment terms are "**not** available" for transportation originating outside the United States, such as the transportation at issue here. JA133.

III. Finally, K-Line contends that it is not a "rail carrier" and so cannot be subject to the Carmack Amendment. The Ninth Circuit correctly rejected that argument based on the record before it. The statutory provisions defining the term "rail carrier" and the STB's jurisdiction require a fact-specific inquiry as to whether a carrier such as K-Line that contracts to execute a multimodal shipment including rail carriage in the United States qualifies as a "rail carrier" in a particular case. The Board's jurisdiction, which is coextensive with the Carmack Amendment's reach, includes "transportation by rail carrier that is . . . by railroad *and water*, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment." 49 U.S.C. § 10501(a)(1)(B) (emphasis added). K-Line contracted to provide transportation by railroad and water from points in China to destinations in the midwestern United States. It therefore cannot avoid as a matter of law the Carmack

Amendment's application to cargo damage occurring on the rail leg of that carriage.

IV. Petitioners assert that these cases are "[j]ust like" *Kirby*. U.P. Br. 2. But *Kirby* involved a choice between a contractual extension of a federal law (COGSA) and the possible application of 50 diverse and conflicting state laws. Here, the choice is between the continued application of a federal statute (the Carmack Amendment) and entirely unregulated transportation.

ARGUMENT

I. THE CARMACK AMENDMENT APPLIES TO THE DOMESTIC RAIL LEG OF A MULTIMODAL SHIPMENT "BETWEEN A PLACE IN . . . THE UNITED STATES AND A PLACE IN A FOREIGN COUNTRY"

As a threshold matter, this Court must first decide whether the Carmack Amendment applies to the rail transportation during which Union Pacific's negligence destroyed respondents' cargo. That straightforward, yes-or-no question can be answered by honoring the statutory text in force when Union Pacific's train derailed. If the Court finds that the Carmack Amendment applies, the Ninth Circuit properly reversed the district court for dismissing the suits on the ground that Tokyo, Japan, should be the forum for these suits.

In 1995, Congress enacted the present version of the Carmack Amendment. Notwithstanding the obvious relevance of the current statutory text, petitioners and their *amici* studiously avoid discussing it in their briefs. But the plain language of the Carmack Amendment as presently in force is clear: the Carmack Amendment applies to the shipments at issue in these cases.

Answering that threshold question requires this Court simply to determine the Carmack Amendment's scope, which requires the Court to decide whether the statute should be construed under the terms now in force or under terms Congress altered three decades ago. It does not require any choice between the Carmack Amendment and COGSA, or implicate any conflict between federal statutes. By its terms, COGSA is explicitly limited to ocean carriage and thus cannot apply with statutory force to the inland leg of a multimodal shipment. The Carmack Amendment is similarly limited to inland carriage and thus cannot apply with statutory force to the ocean voyage governed by COGSA.

If the Carmack Amendment does not apply here, then no statutory regime would govern the U.S. inland leg of virtually any multimodal shipment in foreign trade.[5] Carriers would have unfettered freedom to impose whatever terms they wished, including the freedom to relieve themselves of all liability for negligent cargo handling. For more than a century, every mode of commercial transportation has been subject to mandatory federal law that guarantees minimum rights for cargo interests whose cargo has been damaged through carrier negligence. Petitioners now seek to create a gaping hole in that network of statutory protection so that carriers can henceforth define their own liability rules, free of any regulation whatsoever. Total freedom from regulation promotes not greater uniformity but legal chaos.

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[5] Although the geographic scope of the Harter Act, 46 U.S.C. §§ 30701-30707, is somewhat broader than COGSA's, the Harter Act's application is generally understood to terminate when the ocean carrier delivers the goods to an inland carrier. *See, e.g., Mannesman Demag Corp. v. M/V Concert Express*, 225 F.3d 587, 592 (5th Cir. 2000).

Petitioners offer no sound reason for ignoring the uniform statutory regime that Congress enacted for the express purpose of governing inland transportation.

A. By Its Plain Terms, The Carmack Amendment Applies To The Domestic Inland Leg Of A Multimodal Shipment

This Court begins with the words of the statute in force when the incident giving rise to the lawsuit occurred. *See, e.g., Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) ("The starting point in discerning congressional intent is the existing statutory text . . . and not the predecessor statutes. It is well established that 'when the statute's language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd — is to enforce it according to its terms.'") (citations omitted). Because the Carmack Amendment as applied to railroads is now codified at 49 U.S.C. § 11706,[6] the Court accordingly must begin with that language. Section 11706(a) provides:

> A rail carrier providing transportation or service subject to the jurisdiction of the [STB] under this part [part A of subtitle IV of Title 49 of the United States Code] shall issue a receipt or bill of lading for property it receives for transportation under this part. That rail carrier and any other carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Board under this part are liable to the person entitled to recover under the receipt

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[6] The Carmack Amendment as applied to "motor carriers" (*i.e.*, the trucking industry) is currently codified at 49 U.S.C. § 14706.

or bill of lading. The liability imposed under this subsection is for the actual loss or injury to the property caused by —

(1) the receiving rail carrier;

(2) the delivering rail carrier; or

(3) another rail carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.

Failure to issue a receipt or bill of lading does not affect the liability of a rail carrier. A delivering rail carrier is deemed to be the rail carrier performing the line-haul transportation nearest the destination but does not include a rail carrier providing only a switching service at the destination.

In providing that the Carmack Amendment governs rail carriers "providing transportation or service subject to the jurisdiction of the [STB] under [part A]," *id.* § 11706(a), Congress refers to 49 U.S.C. § 10501, which defines the Board's jurisdiction in this context. Section 10501(a) declares that "the Board has jurisdiction over transportation by rail carrier" in certain defined situations, including "transportation in the United States between a place in . . . the United States and a place in a foreign country." *Id.* § 10501(a)(2)(F).[7]

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[7] Section 10501(a)'s full text provides:

(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is —

(A) only by railroad; or

Accordingly, carriage from Shanghai, Beihai, or Zhangjiagang (each indisputably "a place in a foreign country") to Indianapolis, Milwaukee, Minneapolis, or Chicago (each "a place in . . . the United States") is subject to the Carmack Amendment to the extent the railroad performs that carriage "in the United States." There is also no dispute that the rail journey that originated in Long Beach, California (where the goods were loaded on Union Pacific's train), and proceeded to Tyrone, Oklahoma (where Union Pacific's train derailed), was "transportation by rail carrier" and "transportation in the United States." Thus, the statute's plain language unambiguously extends the Carmack Amendment to the four shipments at issue here.

Petitioners and their *amici* studiously avoid discussing the statutory language in effect both now and at the time of the train derailment that gave rise to these lawsuits. Instead, they focus on prior historical materials that lack any governing legal force and

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(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in —

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country; or

(F) the United States and a place in a foreign country.

effect. As at least K-Line concedes, every exercise in statutory interpretation *should* begin with the plain language of the statute. *See* K-Line Br. 22. But neither Union Pacific nor K-Line ever analyzes the version of § 11706 now in force — and certainly neither offers an interpretive theory for how the plain words can be construed to support the result they seek. *Cf.* U.P. Br. 20 (arguing that "The Pre-1978 Statutory Language Controls This Case"); K-Line Br. 41-49 (arguing that the scope of the Carmack Amendment is determined by the pre-1978 statutory language). The closest either petitioner comes to analyzing any post-1978 text (and even then not the current statute) is K-Line's recognition (at 42) that "the [1978] recodification facially obscured [the pre-1978] restriction" for which petitioners still argue.

It is remarkable in a statutory interpretation case for petitioners to contend that the court below has misconstrued a federal statute without even attempting to explain how the statutory language now in force could be interpreted to support their theory. Union Pacific at least recognizes petitioners' burden to demonstrate that the statutory language has the meaning they advocate, but passes the buck to K-Line. *See* U.P. Br. 23 ("As 'K' Line explains in its brief, the present [statutory] language can be read in a manner consistent with [petitioners' position], without any Orwellian feats of construction."). Not only did K-Line fail to fulfill that promise, but it was no more able than Union Pacific to offer an interpretation of the current statute — Orwellian or otherwise — supporting petitioners' position.[8] Because the

[8] The only *amicus* to make any effort to construe the statutory language to support petitioners is the government. *See*

plain language "transportation in the United States between a place in . . . the United States and a place in a foreign country," 49 U.S.C. § 10501(a)(2)(F), unambiguously describes the shipments at issue here, the Carmack Amendment applies.

B. The Lack Of A Separate Bill Of Lading For The Domestic Inland Leg Of A Multimodal Shipment Does Not Defeat The Carmack Amendment's Applicability

At the petition stage, both petitioners focused on the so-called "separate bill of lading" requirement that four circuits have erroneously adopted. *See, e.g.*, U.P. Pet. 13-24, 26; K-Line Pet. 12-16. They contended that the inland leg of a multimodal shipment should be subject to the Carmack Amendment "only if a separate domestic bill of lading was issued." U.P. Pet. 26; *see also* K-Line Pet. 17. In their merits briefs, both petitioners functionally abandon that position.

U.S. Br. 20-21. As neither party advances that argument, this Court may simply ignore it. *See, e.g., Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991) ("we do not ordinarily address issues raised only by *amici*"). In any event, the government's effort on this point — based entirely on the inclusion of the "adjacent foreign country" language in 49 U.S.C. § 11706(a)(3) — is so weak as to be virtually non-existent. Paragraph (a)(3) has no application to these cases; it governs the liability of railroads other than the "receiving" and "delivering" rail carriers, and there is no such railroad here. But the government asserts (without explanation or textual analysis) that the inclusion of the "adjacent foreign country" language in § 11706(a)(3) for some inexplicable reason means that § 11706 as a whole is limited by the phrase, even though the phrase is conspicuously absent not only from the rest of § 11706 but also from § 10501 (which determines the scope of § 11706). Such a bare *ipse dixit* represents no explanation of how the statute can be construed to reach petitioners' desired result.

The statutory text rebuts any claim of a separate-bill-of-lading requirement. Section 11706(a), incorporating § 10501(a), establishes only three requirements for Carmack coverage. *First*, the defendant must be a "rail carrier" offering transportation either by railroad or by railroad and water. Union Pacific is indisputably such a "rail carrier." We address K-Line's status below. *See infra* pp. 80-90. *Second*, transportation is covered only to the extent that it is "in the United States." 49 U.S.C. § 10501(a)(2). The rail journey from Long Beach to Tyrone was indisputably "in the United States." *Third*, the overall shipment must fall into one of the categories specified in the lettered sub-paragraphs of § 10501(a)(2), such as transportation "between a place in . . . the United States and a place in a foreign country." *Id.* § 10501(a)(2)(F). The four shipments here, from places in China to places in the United States, satisfy that requirement. By specifying three other requirements in considerable detail without imposing a separate-bill-of-lading requirement, therefore, the statutory text rejects the separate-bill-of-lading requirement implicitly.

The Carmack Amendment also *explicitly* rejects such a requirement. The statute declares that "[f]ailure to issue a receipt or bill of lading does not affect the liability of a rail carrier." *Id.* § 11706(a); *cf. id.* § 14706(a)(1) ("Failure to issue a receipt or bill of lading does not affect the liability of a [motor] carrier.").

Petitioners' earlier focus on the separate-bill-of-lading requirement was tactical, for that is the *only* issue in the case on which the lower courts conflict. *See* Br. in Opp. 10-12. Petitioners have now just as tactically abandoned the issue, all but ignoring it in their merits briefs. Indeed, Union Pacific frankly

concedes that *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986) — the case in which the separate-bill-of-lading requirement originated — "is a poorly reasoned decision." U.P. Br. 34 n.6; *cf.* U.P. Pet. 17 (describing origin of separate-bill-of-lading requirement in *Swift Textiles*).

The separate-bill-of-lading argument *is* specious and derives from a stray dictum in *Swift Textiles* that contradicts the court's actual holding. In that dictum, the Eleventh Circuit said:

> [W]hen a shipment of foreign goods is sent to the United States with the intention that it come to final rest at a specific destination beyond its port of discharge, then the domestic leg of the journey (from the port of discharge to the intended destination) will be subject to the Carmack Amendment as long as the domestic leg is covered by separate bill or bills of lading.

799 F.2d at 701. But the Eleventh Circuit actually held that the inland domestic leg of an import from Switzerland was subject to the Carmack Amendment notwithstanding that no domestic bill of lading had been issued to cover that leg of the journey. *See id.* at 700. Subsequent courts have speculated that the dictum may even have been a typographical error. *See Sompo Japan Ins. Co. v. Union Pac. R.R. Co.*, 456 F.3d 54, 62-63 (2d Cir. 2006) (citing *Canon USA, Inc. v. Nippon Liner Sys., Ltd.*, 1994 AMC 348 (N.D. Ill. 1992)). Four courts of appeals nonetheless followed the Eleventh Circuit's dictum while ignoring the statutory text.[9] Indeed, most of those opinions contain

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[9] *See Altadis USA, Inc. v. Sea Star Line, LLC*, 458 F.3d 1288, 1292-93 (11th Cir. 2006), *cert. dismissed*, 549 U.S. 1189 (2007); *American Road Serv. Co. v. Consolidated Rail Corp.*, 348 F.3d 565, 568 (6th Cir. 2003); *Shao v. Link Cargo (Taiwan) Ltd.*, 986

no reasoning at all, simply citing either the *Swift Textiles* dictum or cases relying on it.

In its detailed *Sompo* opinion, the Second Circuit fully exposes the fallacy of the separate-bill-of-lading requirement. *See* 456 F.3d at 61-63. Academic commentary similarly recognizes the correct rule. *See, e.g.*, 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 10-4, at 598 (4th ed. 2004) ("the correct rule . . . is that the Carmack Amendment applies to the inland leg of an overseas shipment conducted under a single bill of lading to the extent that the shipment runs beyond the dominion of COGSA and the Harter Act"); Michael F. Sturley, *Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo*, 40 J. MAR. L. & COM. 1, 8-26 (2009) [hereinafter *Train Wrecks*] (explaining in detail why separate-bill-of-lading requirement is erroneous).[10] In view of those analyses — and petitioners' virtual abandonment of the separate-bill-of-lading argument since this Court granted certiorari[11]

F.2d 700, 703 (4th Cir. 1993); *Capitol Converting Equip., Inc. v. LEP Transp., Inc.*, 965 F.2d 391, 394-95 (7th Cir. 1992).

[10] Professor Sturley's views are entitled to significant weight. Not only is he a leading scholar who also has represented both shippers and carriers before this Court, but he served as the senior adviser to the U.S. delegation that negotiated the Rotterdam Rules. Petitioners' challenge to his credibility at the certiorari stage is baseless and overlooks the many cases in which he represented carriers. Indeed, notwithstanding his representation of the losing party in *Kirby*, Professor Sturley subsequently expressed his agreement as an academic with *Kirby*'s uniformity principle. *See* Sturley, *Train Wrecks*, 40 J. MAR. L. & COM. at 1 n.aa1, 21.

[11] Because petitioners have virtually abandoned the principal argument on which they persuaded this Court to grant certiorari, the Court may wish to consider dismissing the petition as improvidently granted.

— the argument has no merit and should be rejected by this Court.

C. Superseded Statutory Language — Which Arguably Limited The Applicability Of The Carmack Amendment In International Trade To Exports To Adjacent Foreign Countries — Does Not Alter The Plain Meaning Of The Current Statute

1. Petitioners' present effort to avoid the statutory regime imposed by Congress invites this Court to apply neither the current language of the statute nor even the language of the predecessor statute in force immediately before the most recent enactment of the Carmack Amendment in 1995. Rather, petitioners seek re-adoption by judicial fiat of statutory language last in force during the Carter Administration and amended twice in the last three decades. In making that highly unconventional argument, they rely primarily on the presumption that a recodification statute does not work a substantive change to existing law absent a clear indication of congressional intent to change the law. *See* U.P. Br. 22 (citing *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957)); K-Line Br. 47 (citing *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136 (2008) (citing *Fourco Glass*, 353 U.S. at 227)).

Like any presumption, however, that principle can apply only to clarify an otherwise ambiguous law. No judicial presumption could override the unambiguous language of an Act of Congress, as exists here. In any event, Congress clearly expressed its intent to apply the Carmack Amendment without regard to the limitations advocated by petitioners by repealing the statutory language on which they rely and enact-

ing new language that cannot plausibly support an interpretation exempting them from coverage.

Petitioners advocate an untenable interpretive approach. Neither petitioner argues for interpreting the text differently from the plain meaning adopted by the court below.[12] Instead, they invite the Court to look behind the current text to see what the predecessor statute said before the current language was enacted 15 years ago. And, when that language just as clearly conflicts with the result petitioners seek, they invite the Court to go back yet again to discern the meaning of a statute in force another 17 years earlier. Only then — when petitioners finally find a statutory text in accord with their litigation objective — do they finally ask the Court to consider its meaning.

Contrary to Union Pacific's assertion (at 21), such an interpretation of codification bills is not "useful." Rather, codification laws will be of no use if their plain language has no operative legal effect. Under Union Pacific's approach, everyone affected by U.S. law must maintain a library of prior, superseded

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[12] Indeed, neither petitioners nor their *amici* cite any case in which any court has ever construed the current statute — even with the assistance of the *Fourco Glass* presumption — to deny Carmack coverage on the grounds that the shipment at issue involved an import from a foreign country or trade with a non-adjacent foreign country. Respondents have been unable to discover any such case. Numerous cases applied the Carmack Amendment to the inland leg of a shipment from a non-adjacent foreign country — including the principal case on which petitioners relied at the certiorari stage. *See Swift Textiles*, 799 F.2d at 700 (applying Carmack Amendment to inland leg of shipment from Switzerland); *see also, e.g., Sompo*, 456 F.3d at 56, 76 (Japan); *Neptune Orient Lines*, 213 F.3d at 1119 (Indonesia); *cf., e.g., Project Hope v. M/V Ibn Sina*, 250 F.3d 67, 73-75 (2d Cir. 2001) (shipment to Egypt).

statutes just in case a current statute might mean not what it plainly says but rather what some long-since repealed predecessor statute once said. Given the many revisions to longstanding statutes, such an approach would produce interpretive chaos. No one would ever know whether to rely on the current statute or to spend hours searching through superseded legislation for a predecessor provision that might have a different meaning.[13] Petitioners would set the law on its head by using the *Fourco Glass* presumption to contradict the plain meaning of an otherwise unambiguous statute by reference to a prior ambiguous text.[14]

Respondents do not question the applicability of the *Fourco Glass* presumption in its proper place. When recodification language is ambiguous and might arguably bear more than one meaning, a court

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[13] Petitioners' reliance on repealed predecessor statutes is not limited to the recodification context. The current version of the Carmack Amendment was enacted in the ICCTA, which was not a recodification statute.

[14] Petitioners go to great lengths to mask the ambiguities in the pre-1978 understanding of the predecessor statute by their efforts to distinguish *Galveston, Harrisburg & San Antonio Railway Co. v. Woodbury*, 254 U.S. 357 (1920). *See* U.P. Br. 25-33; K-Line Br. 44-46. Although they attempt to dismiss Justice Brandeis's reasoning in *Galveston* as addressing the Act's jurisdictional provision rather than the Carmack Amendment's scope provision, the jurisdictional provision at issue there was a predecessor to the current 49 U.S.C. § 10501 — the provision that now determines the geographical scope of the Carmack Amendment. This Court's decision in *Union Pacific R.R. Co. v. Burke*, 255 U.S. 317 (1921), further illustrates those ambiguities. There, this Court applied the Carmack Amendment to the inland leg of a multimodal shipment from (non-adjacent) Japan under a through bill of lading. Neither petitioner addresses *Burke*.

appropriately might look back to the prior law to see if it supports one of the current law's plausible meanings. The presumption offers a tool for using an older, but clearer, statute to help construe a more recent but ambiguous recodification. Here, by contrast, the lower court's interpretation of § 11706(a) and § 10501(a) is unarguably correct. Petitioners offer no plausible contrary argument in their principal briefs — and their reply briefs will be too late to do so.

2. Petitioners offer several legal sources to prop up their *Fourco Glass* argument, but none provides the requisite support. *First*, the cases petitioners cite are readily distinguishable. In every one, the governing statute was at least ambiguous. In at least some (perhaps all) of those cases, this Court used the presumption simply to reinforce the majority's conclusion of the more natural reading of the current statute. At the very least, in every case the party advocating application of the *Fourco Glass* presumption made a strong textual argument supporting a plausible reading of the recodified statute that was consistent with the prior law.

Consider, for example, *Cass v. United States*, 417 U.S. 72, 81-82 (1974), which petitioners treat as the strongest support for their argument. *See* U.P. Br. 22-23 (discussing *Cass* Court's invocation of *Fourco Glass* presumption without discussing its application in any other case); *cf.* K-Line Br. 47 (citing presumption but not discussing its application in any case). Union Pacific seeks to leave the impression that the *Cass* Court ignored the plain meaning of 10 U.S.C. § 687(a) (1970), the statute then at issue, to apply the presumption instead. *See* U.P. Br. 22-23. The opinion flatly contradicts that view, finding it "[o]bvious[]" that "there is room for reasonable

dispute over the construction of § 687(a) based on the statutory language alone." 417 U.S. at 77 n.5. Indeed, the government's principal argument in *Cass* for construing § 687(a) consistently with the predecessor statutes was "that the language of the statute shows that Congress intended" that result. Brief for the Respondents at 8, *Cass*, No. 73-604 (U.S. filed Apr. 9, 1974). A detailed textual analysis of § 687(a), *see id.* at 9-10, confirmed by the plain language of related statutory provisions, *see id.* at 11-12, demonstrated Congress's intended meaning. The government's secondary argument rested on the administrative interpretation of the agencies administering the provision, *see id.* at 12-13, which was "consistent with . . . the language of the statute," *id.* at 13. The third element of the government's argument was legislative history, and the *Fourco Glass* presumption was mentioned in a single paragraph at the end of that argument. *See id.* at 22-23.

Petitioners cite no case in which this Court applied the *Fourco Glass* presumption to contradict the plain meaning of an unambiguous statute, and respondents are aware of no such case. Indeed, any such judicial presumption could not overrule a statute's plain meaning without creating serious separation-of-powers issues.

Second, petitioners rely on a provision in the 1978 recodification that instructed courts to interpret that recodification consistently with prior law. *See* Act of Oct. 13, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466. That provision applied to statutory language in force from 1978 to 1995 — well before the events at issue here. It was repealed in 1995, when the current Carmack Amendment was enacted in the

ICCTA.[15] Congress did not include language comparable to § 3(a) in the 1995 statute, which was not a recodification.

Even if § 3(a) of the 1978 recodification were still in force, it could not sustain the heavy burden petitioners place on it. At most, such a general provision would have informed the interpretation of an otherwise ambiguous provision elsewhere in the same enactment, but could not have overruled the unambiguous plain language of the specific provisions that govern here. Section 3(a) would have operated simply as a statutory version of the judicial *Fourco Glass* presumption. When a recodified provision of the statute is ambiguous, § 3(a) simply instructs courts to do what they already do under the *Fourco Glass* presumption.

When a recodified provision of the statute is unambiguous, on the other hand, as § 11706(a) and § 10501(a) are here, a reviewing court would properly harmonize a provision like § 3(a) with the unambiguous language it is construing by giving effect to both provisions. *See, e.g., Carcieri v. Salazar*, 129 S. Ct. 1058, 1066 (2009) ("'[W]e are obliged to give effect, if possible, to every word Congress used.'") (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). Because an interpretive statutory command designed for ambiguous language has no role to play in the construction of *unambiguous* language, the plain meaning of the unambiguous provision controls.

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[15] The Carmack Amendment was substantially revised in 1995. Immediately prior to that reenactment, for example, it was a single provision governing both rail and motor carriers. *See* 49 U.S.C. § 11707 (Supp. II 1978). It is now two provisions, one governing railroads and the other motor carriers. *See supra* note 6 and accompanying text.

Widely recognized canons of statutory construction support the principle that a more specific provision governing the precise issue at hand (the applicability of the Carmack Amendment) trumps a more general provision offering guidance across the entire recodification. *See, e.g., National Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 335 (2002) ("[S]pecific statutory language should control more general language when there is a conflict between the two.").

D. COGSA § 7 Does Not Displace The Carmack Amendment's Application

Petitioner K-Line argues that the Carmack Amendment's application to the rail transportation at issue here would somehow conflict with COGSA § 7. *See* K-Line Br. 33-36; *cf.* U.P. Br. 36 (suggesting "that Congress believed parties could use" COGSA § 7). That argument ignores the plain language (and intended purpose) of at least three COGSA provisions: COGSA does not apply to inland carriage (§ 1(e)), and nothing in COGSA overcomes (or permits private parties to overcome) the mandatory application of the Carmack Amendment (§§ 7, 12).

By its plain terms, § 7 simply preserves the freedom to apply COGSA (or any other liability regime) as a *matter of contract* to those portions of a multimodal shipment that are outside the statutory scope of COGSA, but only if no other mandatory law applies. As *Kirby* recognized, COGSA by its terms applies with statutory force only "'from the time when the goods are loaded on to the time when they are discharged from the ship.'" 543 U.S. at 29 (quoting COGSA § 1(e)). For the portion of a shipment outside of that period, when COGSA does not apply of its own force, § 7 declares that "[n]othing con-

tained in this Act shall prevent" the parties from agreeing on liability rules of their choice. The chosen rules might be embodied in COGSA, some other widely recognized liability regime, or (as is most frequently the case) unique rules that the carrier has drafted for its own protection. Section 7 declares nothing more than the truism that "[n]othing contained in [COGSA]" restricts the parties' freedom during periods when COGSA does not apply.[16] It does not address whether other mandatory law applying to inland carriage restricts the parties' freedom.

By contrast, § 12 directly speaks to whether COGSA addresses mandatory law for inland carriage. In full, § 12 provides:

> Nothing in this Act shall be construed as superseding any part of the [Harter Act, 46 U.S.C. §§ 30701-30707], or of *any other law which would be applicable in the absence of this Act*, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

COGSA § 12 (emphasis added). Because the Carmack Amendment is "applicable in the absence of

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[16] Section 7 provides in full:

> Nothing contained in this Act shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

COGSA § 7.

[COGSA]," nothing in COGSA "supersed[es] any part of" it with respect to the carrier's liability before loading or after discharge from the ship, including during inland carriage. Notably, K-Line has nothing to say about COGSA § 12.

K-Line asserts incorrectly (at 36) that Congress "paid conscious heed" to COGSA § 7 with the intent that COGSA would displace the Carmack Amendment during inland transportation. Section 7 is nothing more than the U.S. enactment of article 7 of the Hague Rules, the international treaty on which COGSA was based. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995); *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 301 (1959). The only attention that Congress paid to § 7 was to ensure that it would not displace existing U.S. law (such as the Carmack Amendment). *See* Michael F. Sturley, *Freedom of Contract and the Ironic Story of Section 7 of the Carriage of Goods by Sea Act*, 4 BENEDICT'S MAR. BULL. 201, 206-07 (2006) (detailing the history of § 7's enactment). Section 12, on the other hand, is a unique U.S. provision with no counterpart in the Hague Rules. Accordingly, it was the provision to which Congress "paid conscious heed." *Id.* Indeed, Congress was told that "[§ 12] renders [§ 7] largely if not wholly inoperative insofar as concerns the United States." *Carriage of Goods by Sea: Hearing on S. 1152 Before the S. Comm. on Commerce*, 74th Cong. 32 (1935) (memorandum of U.S. Chamber of Commerce).

E. Applying The Carmack Amendment's Plain Language To Govern The Inland Leg Of A Multimodal Shipment Best Accomplishes The Uniformity Goals This Court Recognized In *Kirby*

Petitioners and their *amici* argue that rejecting the Carmack Amendment's application to the inland leg of a multimodal shipment would best achieve the benefits of uniformity recognized by this Court in *Kirby*. Thus, Union Pacific predicts that reversal of the decision below would yield "uniform, consistent . . . rules governing both the ocean and inland legs" and "uniform terms governing an entire [multi]modal shipment." U.P. Br. 36; *see also, e.g.*, K-Line Br. 36 (unfettered freedom of contract "permits uniform rules to govern all phases of international through shipments"); *id.* at 37 (applying Carmack Amendment "would eliminate . . . uniformity"); AAR Br. 14 (promising "uniform terms that apply to the entire shipment").

In fact, the best way to promote uniformity in this context is to respect Congress's policy and apply the Carmack Amendment uniformly to virtually all long-haul rail transportation in this country, including the inland leg of a multimodal import shipment. As the government (at 5, 27-29) and petitioners' *amicus* International Group (at 26) recognize, Congress passed the Carmack Amendment to provide uniform national liability rules, *see Adams Express*, 226 U.S. at 505-06, thus displacing the state liability rules that had applied before then, *see Pennsylvania R.R.*, 191 U.S. at 491. Applying the Carmack Amendment in cases such as this one ensures that virtually[17] all

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[17] Purely intrastate cargo, which is not a significant concern, is outside the Carmack Amendment's scope.

of a particular train's cargo will be subject to the same liability rules if a catastrophic accident, such as a major derailment, occurs. If the Carmack Amendment were held *not* to apply here, then different liability regimes would govern domestic shipments (including multimodal shipments involving ocean carriage from Hawaii, Alaska, Puerto Rico, and other territories) and international shipments — even though the same trains carry both types of shipments.[18]

Moreover, different liability regimes would apply to different international shipments depending on the terms of the multimodal bills of lading under which each is carried. Consider, for example, the underlying choice-of-forum issue in these cases. Under petitioners' theory, shippers of domestic cargo would receive the benefit enacted by Congress in § 11706(d). They would be permitted to resolve their claims in a convenient U.S. forum. Cargo interests subject to K-Line's bill of lading, on the other hand, would lose § 11706(d)'s protection and be forced to bring their claims in Japan (if their claims are large enough to justify the added expense). If cargo carried under a bill of lading issued by COSCO (a Chinese ocean carrier) were damaged in the same derailment, however, those claimants would be forced to sue in China. *See Jewel Seafoods Ltd. v. M/V Peace River*, 39 F. Supp. 2d 628, 629-30 (D.S.C. 1999) (describing COSCO bill

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[18] As Union Pacific admits, under petitioners' theory, two containers on identical journeys would be subject to different legal regimes based on the documentation that was used. If a new domestic bill of lading had been issued for one of the containers imported on one of the K-Line ships involved in these cases, that container would have been treated as a domestic shipment subject to the Carmack regime. *See* U.P. Br. 44-45.

of lading with Chinese forum clause). And, when Cho Yang was the ocean carrier issuing the bills of lading, claims would have to be heard in Korea. *See Allianz Ins. Co. of Canada v. Cho Yang Shipping Co.*, 131 F. Supp. 2d 787, 789, 792 (E.D. Va. 2000) (Korean forum clause). For Hapag-Lloyd, the required forum would be in Germany. *See Jockey Int'l, Inc. v. M/V "Leverkusen Express"*, 217 F. Supp. 2d 447, 448, 456 (S.D.N.Y. 2002) (German forum clause). For Lauritzen Reefers, the required forum would be in England. *See Kelso Enters., Ltd. v. M/V Wisida Frost*, 8 F. Supp. 2d 1197, 1200-01 (C.D. Cal. 1998) (English forum clause). For Croatia Line, the required forum would be in Croatia. *See Pasztory v. Croatia Line*, 918 F. Supp. 961, 963 (E.D. Va. 1996) (Croatian forum clause). For Egypt Azov Shipping Co., the required forum would be in Egypt. *See Nippon Fire & Marine Ins. Co. v. M.V. Egasco Star*, 899 F. Supp. 164, 166, 167 (S.D.N.Y. 1995) (Egyptian forum clause), *aff'd*, Nos. 96-7441(L) & 96-7481(XAP), 1996 WL 614811 (2d Cir. Oct. 21, 1996) (judgment noted at 104 F.3d 351). And the list could go on for pages, particularly because non-vessel operating common carriers ("NVOCCs") also issue through bills of lading with different terms than ocean carriers. *See, e.g., Kirby*, 543 U.S. at 19, 21.

The net result under petitioners' theory is legal chaos. With more than 140 different shipping lines (not to mention countless NVOCCs) serving the port of Long Beach, and a typical train from Long Beach to the Midwest carrying literally hundreds of containers from a wide variety of ships,[19] any given train

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[19] *See* Port of Long Beach, Trade/Commerce, *at* http://www.polb.com/economics/default.asp (last visited Feb. 9, 2010). Although the four shipments at issue here were all under

may well carry cargo shipped under literally scores of different bills of lading, each with its own set of terms and forum provisions. Under petitioners' theory, responsibility for resolving the claims from a single derailment would be scattered among courts around the world — despite the fact that all the claims arose from a single incident, the same core evidence of the railroad's negligence would be relevant in every claim, and the principal defendant would be the same U.S. railroad in every case. The only possible explanation for such an absurd result would be the carriers' desire to make litigating their actions so impractical they avoid the consequences of their negligence. It most certainly does not produce the uniformity to which petitioners pay mere lip service. And it is impossible to believe that Congress intended that result.

To make matters worse, petitioners' theory would not even achieve the promised uniformity between the ocean leg and the inland leg on a single shipment. Although petitioners are quick to cite COGSA § 7 for authority to extend COGSA beyond the tackle-to-tackle period, *see, e.g.*, K-Line Br. 33, § 7 actually provides a limited freedom to apply any liability regime outside COGSA's reach. If the Carmack Amendment did not apply to the inland leg of a multimodal shipment, an ocean carrier could impose practically any liability rules it wishes for inland carriage.[20] Nothing would require a carrier to apply

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K-Line bills of lading, they were carried from China on three different ships.

[20] As a practical matter, it is more likely that railroads will require ocean carriers to impose broad non-liability rules for inland carriage in their multimodal bills of lading. Railroads already require ocean carriers to indemnify them from any lia-

COGSA (or one of the other international maritime regimes) to the inland leg. Unless the carrier voluntarily extends the same rules that apply to the ocean carriage to the inland leg, there will be no uniformity.[21]

The lack of uniformity even under a single contract is not an abstract concern. The *Altadis* case, for example, which this Court granted certiorari to decide, arose from a carrier's effort to impose a non-uniform liability term on the inland leg of a multimodal shipment — a term that not only differed from COGSA but was prohibited by COGSA. *See* Sturley, *Train Wrecks*, 40 J. MAR. L. & COM. at 21-22. Indeed, this Court need look no further than the K-Line bills of lading in these cases to see that petitioners' theory leads to less uniformity, not more. Petitioners do not in fact ask for "uniform terms governing an entire [multi]modal shipment" (U.P. Br. 36) or "uniform rules to govern all phases of international through shipments" (K-Line Br. 36). They ask this Court to enforce K-Line's bills of lading, which explicitly provide different (non-COGSA) terms for the inland

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bility that they may suffer as the result of the ocean carriers' failure to include the clauses necessary to protect the railroads from Carmack liability to the extent permissible under current law. *See, e.g.*, Paul Keane, *US Law — COGSA Limitations and Intermodal Transport*, 192 GARD NEWS 22, 24 (2008).

[21] Even if the carrier voluntarily extended the ocean regime to the U.S. inland leg, it is unlikely that the same regime would also apply to the inland leg at the other end of the ocean journey. Most other countries also have mandatory regimes governing inland carriage that are different from the ocean regime. Indeed, the K-Line bills of lading in these cases expressly provide different rules for U.S. and non-U.S. inland carriage. *Compare* clause 4(1) (JA 144) *with* clause 3(B)(1) (quoted *infra* p. 53). Thus, petitioners' theory could not result in a single liability regime governing the entire shipment.

leg of a multimodal shipment. Clause 23(3), for example, requires claims for inland damage to be filed "within 9 months after delivery of Goods or the date when Goods should have been delivered, failing which Carrier will be discharged of all liability therefor." JA147. The bills of lading do not purport to extend that requirement to ocean damages, *cf. id.* (clause 23(2)), and COGSA itself would in any event invalidate such an extension if K-Line had attempted it, *see* COGSA § 3(8) (invalidating any contractual provision "relieving the carrier or the ship from liability . . . or lessening such liability otherwise than as provided in this Act"); *Sky Reefer*, 515 U.S. at 535 (recognizing an effort to shorten the claimant's time to bring a claim as a violation of § 3(8)).

F. Applying The Carmack Amendment's Plain Language To Govern The Inland Leg Of A Multimodal Shipment Will Not Produce The Adverse Effects Imagined By Petitioners And Their *Amici*

To detract attention from the statute's plain language, petitioners and their *amici* imagine a parade of horribles predicted to ensue if this Court applies the Carmack Amendment according to its unambiguous terms. On one level, those arguments are completely misplaced. Petitioners in essence ask this Court to substitute its judgment for Congress's. Congress already has made the decision to regulate domestic rail carriage in a wide variety of contexts (including under a through bill of lading governing transportation "between a place in . . . the United States and a place in a foreign country"). This Court should decline the invitation to override Congress's choice. In any event, petitioners' policy arguments

against a plain reading of the statute have no factual basis.

1. Applying the Carmack Amendment to the inland leg of a multimodal shipment will not create any tension with the U.S. position in negotiating the Rotterdam Rules

As the government notes (at 11), the United States recently signed the U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules"), U.N. Doc. A/RES/63/122 (Dec. 11, 2008). When it enters into force, the Convention will change the liability rules for multimodal shipments such as those at issue here. *Amicus* International Group argues (at 29-33) that the result below is in tension with the position that the U.S. delegation took in negotiating the Rotterdam Rules because the United States favored the broad application of a uniform maritime liability rule. That argument is baseless. The decision below is fully consistent with both the Rotterdam Rules and the United States' negotiating position.

Although the U.S. delegation did indeed favor the broad application of a uniform maritime liability rule to *maritime* performing and contracting parties, the International Group ignores an important exception: The United States expressly opposed the suggestion that the uniform maritime liability rule should apply to inland carriers, such as Union Pacific. *See, e.g.*, *Proposal of the United States of America on the Definition of "Maritime Performing Party"*, U.N. doc. no. A/CN.9/WG.III/WP.84, at ¶¶ 1-2 (Feb. 28, 2007). Indeed, in the very document that the International Group (at 30-31) quotes in support of its argument, the United States explained in detail that the new

convention should not change existing law with respect to railroads and other inland carriers:

> With regard to [non-maritime] performing parties, the Instrument should not create new causes of action or preempt existing causes of action. For example, the liability of an inland carrier (e.g., a trucker or a railroad) should be based on existing law. In some countries, this may be a regional unimodal convention such as CMR. In others, it may be a mandatory or nonmandatory domestic law governing inland carriage . . . .

Proposal by the United States of America, U.N. doc. no. A/CN.9/WG.III/WP.34, at ¶ 7 (Aug. 7, 2003).

Consistent with the U.S. position, the Rotterdam Rules provide that the liability of railroads and other non-maritime performing parties will be governed by the law that would otherwise apply, not by the uniform regime established under the Convention. *See, e.g.*, *Report of Working Group III (Transport Law) on the Work of Its Nineteenth Session (New York, 16-27 April 2007)*, U.N. doc. no. A/CN.9/621, at ¶¶ 132-137, 144-145 (May 17, 2007); *cf.* Rotterdam Rules arts. 1(7), 19 (applying uniform regime to maritime performing parties). The decision below therefore is fully consistent with both the Rotterdam Rules and the United States' negotiating position.

By contrast, petitioners' position is directly contrary to both. Petitioners' claim is that respondents should be forced to litigate the consequences of a U.S. train derailment in Japan. Articles 66 and 67 of the Rotterdam Rules, however, would invalidate the choice-of-forum clause on which petitioners rely[22]

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[22] Article 67 of the Rotterdam Rules recognizes exclusive forum-selection clauses in limited circumstances that are not

and instead guarantee respondents' access to a convenient forum of their choice, including a court with jurisdiction over "the port where the goods are finally discharged from a ship" (art. 66(a)(iv)). The United States not only supported that position but was one of its strongest advocates. *See, e.g., Proposal by the United States of America Regarding the Inclusion of "Ports" in Draft Article 75 of the Draft Convention in the Chapter on Jurisdiction*, U.N. doc. no. A/CN.9/WG.III/WP.58 (Nov. 16, 2005); *Proposal by the United States of America*, U.N. doc. no. A/CN.9/WG.III/WP.34, at ¶¶ 30-32 (Aug. 7, 2003). Indeed, it is surprising that *amicus* overlooked such significant provisions. The International Group admittedly opposed the Rotterdam Rules' jurisdiction provisions during the UNCITRAL negotiations. *See, e.g., Comments and Proposals by the International Chamber of Shipping, BIMCO and the International Group of P&I Clubs on Topics on the Agenda for the 18th Session*, U.N. doc. no. A/CN.9/WG.III/WP.73, at ¶¶ 2-5 (Aug. 28, 2006). But *amicus*'s present counsel recently explained elsewhere that "[t]he Rotterdam Rules will restore to a great extent" the pre-*Sky Reefer* rule prohibiting forum-selection clauses in bills of lading. *See* Chester D. Hooper, *Forum Selection and Arbitration in the Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, or The Definition of Fora Conveniens*

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applicable here. Even if K-Line's service contracts satisfied the safeguards required by article 67(1)(a)-(b), which they do not, that would at most permit enforcement of forum-selection clauses in those service contracts, not the Japan forum-selection clauses in the bills of lading. In any event, under article 67(2), neither clause (in the service contracts or the bills of lading) would bind third parties such as respondents.

Set Forth in the Rotterdam Rules, 44 TEX. INT'L L.J. 417, 422 (2009).

2. Applying the Carmack Amendment to the inland leg of a multimodal shipment will not disrupt settled expectations in the transportation industry

The transportation industry has been working with mandatory national law governing inland carriage for decades. The United States is unusual in allowing private parties to opt out of the national law governing inland carriage in certain circumstances; most countries' mandatory law is far stricter. For most of Europe and parts of Asia and North Africa, for example, regional conventions supply mandatory law for road and rail carriage. *See* Convention on the Contract for the International Carriage of Goods by Road (CMR), May 19, 1956, 399 U.N.T.S. 189; *Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM)*, Appendix B to the Convention Concerning International Carriage by Rail (COTIF), May 9, 1980, 1397 U.N.T.S. 2, 112, as amended by Protocol for the Modification of the Convention Concerning International Carriage by Rail (COTIF) of 9 May 1980, June 3, 1999 (CIM-COTIF) (*available as amended at* http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff/02_COTIF_99/RU-CIM-1999-e.PDF). The transportation industry has long been dealing with those inland regimes without difficulty.

Indeed, K-Line's bills of lading in this very case demonstrate not only that the industry can deal with mandatory law governing inland carriage but that K-Line and its subcontracting inland carriers are already doing so. Most specifically, clause 3(B)(1),

which governs inland carriage everywhere except the United States, provides:

> Carrier's responsibility, if any, for any loss or damage to Goods proven to have taken place during any period other than Water Carriage shall be governed by any relevant provisions contained in any applicable international convention or national law which provisions (a) cannot be departed from by private contract to the detriment of Merchant, and (b) would have applied if Merchant had made a separate and direct contract with Carrier in respect of the particular stage of Carriage during which the loss or damage occurred.

In other words, if the cargo at issue here had been damaged by the negligence of a European railroad (rather than a U.S. railroad), the bills of lading would have provided explicitly for the governing inland legal regime to apply. Because clause 3(B)(1) applies throughout the world except in the U.S. trade, K-Line's "settled expectations" litigation argument is inconsistent with its ordinary business practices.

Outside of the litigation context, even railroads are adamant that they prefer the Carmack Amendment to uniform maritime law. Throughout the negotiation of the Rotterdam Rules, the U.S. railroad industry argued vigorously that they prefer to retain the Carmack Amendment rather than having the new uniform regime extended to them. Early in the process, for example, petitioners' *amicus* AAR — an organization in which Union Pacific is one of the most powerful members — filed formal comments strongly opposing the suggested extension of uniform

maritime rules to govern the inland leg of an international multimodal shipment:

> The U.S. and Canadian railroad members of the AAR have serious concerns over the application of the Draft Instrument to rail transportation. There is already an existing and well established system in the U.S. and Canada which governs the liability of rail carriers for loss and damage to goods transported and the rights and obligations of both the rail carrier and the shipper. This system was promulgated by legislation . . . .

Comments on Behalf of the Association of American Railroads Relating to the Preliminary Draft Instrument on the Carriage of Goods by Sea in *Compilation of Replies to a Questionnaire on Door-to-Door Transport and Additional Comments by States and International Organizations on the Scope of the Draft Instrument*, U.N. doc. no. A/CN.9/WG.III/WP.28, at 32 (Jan. 31, 2003). A footnote clarified that the "existing and well established system" referred to the Carmack Amendment. *Id.* at 32 n.2. Indeed, the AAR described the Carmack Amendment, in the context of international multimodal shipments, as "the statute providing the underpinning upon which the system of liability for loss and damage to transported goods is based." *Id.* at 33 n.3. In sum, the railroads consistently argued that they are governed by the Carmack Amendment and preferred to maintain that system. *See also* Sturley, *Train Wrecks*, 40 J. MAR. L. & COM. at 37-39.

II. PETITIONERS DID NOT VALIDLY CONTRACT AROUND THEIR OBLIGATIONS UNDER THE CARMACK AMENDMENT

Petitioners do not dispute that the forum-selection clauses requiring these cases to be brought in Japan violate the Carmack Amendment. But Union Pacific contends that, even if the Carmack Amendment applies to the rail transportation in these cases, the Japan forum-selection clauses can be enforced because it validly contracted around the Carmack Amendment's venue requirements. In so arguing, it relies on two statutory provisions, 49 U.S.C. § 10709 and § 10502(e). The former is inapplicable, and petitioners did not comply with the latter's requirements.

A. Section 10709 Does Not Apply To The Exempt Transportation At Issue Here

1. Congress set forth different statutory approaches to rail carrier liability for losses or damage to cargo

Three statutory provisions bear on rail carriers' obligation to offer shippers particular terms for liability and claims. First, the Carmack Amendment itself makes rail carriers liable "for the actual loss or injury to the property." 49 U.S.C. § 11706(a). It allows carriers to "establish rates for transportation of property under which . . . the liability of the rail carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier." *Id.* § 11706(c)(3)(A). The Carmack Amendment also specifies the venues in which a suit to recover for property damage may be brought:

> (i) against the originating rail carrier, in the judicial district in which the point of origin is located;

> (ii) against the delivering rail carrier, in the judicial district in which the principal place of business of the person bringing the action is located if the delivering carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and
>
> (iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

Id. § 11706(d)(2)(A).

Second, 49 U.S.C. § 10502 permits the STB to exempt persons or services from most rail regulation. But it forbids the Board from issuing an order that "operate[s] to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706 of this title" — *i.e.*, the Carmack Amendment's provisions imposing statutory liability on rail carriers for actual loss or injury to property and providing for enforcement of that liability. *Id.* § 10502(e).[23] Section 10502(e) further provides that nothing in the Carmack Amendment "shall prevent rail carriers from offering alternative terms." *Id.* That language has been interpreted to permit a carrier to contract around the Carmack Amendment's requirements, so long as it first provides the shipper with an opportunity to select terms that comply with Carmack. *See* Pet. App. 28a; U.S. Br. 30; *cf.* 49 U.S.C. § 11706(c)(3); *New York, N.H. & H. R.R. Co. v. Nothnagle*, 346 U.S. 128, 135 (1953) (applying the

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[23] A similar provision exists for motor carriers. *See* 49 U.S.C. § 13541.

provision of the Carmack Amendment now found in § 11706(c)(3)).

Third, § 10709 provides a different approach, by authorizing rail carriers to "enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions." *Id.* § 10709(a). Parties to a § 10709 contract "shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract." *Id.* § 10709(b). Exercising its exemption authority under § 10502, the STB has exempted rail transportation as part of multimodal shipments (such as the transportation involved in these cases) from the provisions of subtitle IV of Title 49. That STB exemption includes § 10709. *See* 49 C.F.R. § 1090.2. Transportation that is exempt from § 10709 cannot be the subject of a contract under that provision. *See* U.S. Br. 30-32; Pet. App. 32a-33a.

In those three ways, a rail carrier must address the issue of its negligent loss or damage to cargo. The Carmack Amendment imposes liability by statute under § 11706(a), absent specific contractual treatment. If the STB exempts a rail carrier from the normal common-carrier obligations, the carrier and shipper may contract around the Carmack Amendment, if the carrier first offers terms consistent with § 11706 and the shipper elects alternative terms. *See id.* § 10502. And, finally, under a third approach to liability issues, a rail carrier providing non-exempt transportation may enter into a contract with purchasers of rail service under § 10709(a) to provide services under specified conditions.

2. The statutory history illuminates the separate functions of § 10502 and § 10709

Throughout much of the twentieth century, the federal government closely regulated rail transportation. The ICA required carriers to declare their rates in tariffs filed with the ICC, which had the power to review those rates for reasonableness and to ensure that carriers did not discriminate among shippers.

Before the Carmack Amendment, carriers routinely compelled a shipper "to make with each carrier in the route over which his package must go a separate agreement limiting the carrier liability of each separate company to its own part of the through route." *Atlantic Coast Line*, 219 U.S. at 199-200. If the shipment was damaged, the shipper was forced to pursue separate actions against each carrier. By enacting the Carmack Amendment in 1906, Congress made carriers liable for the full value of any damage to the property they transport. *See* 49 U.S.C. § 11706(a).

The Carmack Amendment also relieved shippers of the "difficult, and often impossible, task of determining on which of the several connecting lines the damage occurred." *Missouri, K. & T. Ry.*, 244 U.S. at 387; *see also Atlantic Coast Line*, 219 U.S. at 200 (identifying "[t]his burdensome situation of the shipping public" as the one that "Congress undertook to regulate"); 40 Cong. Rec. 9580 (1906) (statement of Rep. Richardson regarding conference committee's addition of Carmack Amendment to bill) (explaining that carriers have "a through-route connection" and "a settlement between them will be an easy matter, while the shipper would be at heavy expense in the institution of a suit"). Under the Carmack Amend-

ment, a shipper can bring an action against the receiving or delivering carrier for damages caused by any carrier over whose line or route the cargo is transported. *See* 49 U.S.C. § 11706(a).

In 1980, Congress largely deregulated the rail industry when it passed the Staggers Rail Act. As a general rule, carriers still must establish rates and terms that are available to all shippers upon request and subject to certain statutory and regulatory restrictions — that is, "common carrier" rates and terms. *See id.* § 11101(a), (e) (requiring rail carriers to provide transportation or service "on reasonable request" and "in accordance with the rates and service terms, and any changes thereto, as published or otherwise made available under subsection (b), (c), or (d)").

Congress created two ways for rail carriers to provide service on other rates and terms and without those restrictions. First, a carrier providing non-exempt transportation may contract with a shipper to do so. *See id.* § 10709(a) (authorizing rail carriers to "enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions"). If the shipper agrees to a contract under § 10709, the carrier is relieved of all duties other than those specified in the contract. *See id.* § 10709(b) ("A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract."). If the shipper does not agree, it may obtain service on the common-carrier rates and terms, *including* terms that comply with the Carmack Amendment's provisions. *See id.* § 10709(f) ("A rail carrier that enters into a contract as authorized by

this section remains subject to the common carrier obligation set forth in section 11101, with respect to rail transportation not provided under such a contract."); H.R. Conf. Rep. No. 96-1430, at 100 (1980) ("Shippers who do not elect to enter into contracts, or are unable to do so, are assured that carriers will have the same common carrier obligations as in existing law."), *reprinted in* 1980 U.S.C.C.A.N. 3978, 4110, 4132. Thus, a shipper offered a § 10709 contract always has the option to choose the Carmack Amendment's statutory terms (and other common-carrier protections). *See* U.S. Br. 31-32.

Second, apart from § 10709, Congress gave the STB — as successor to the ICC — broad authority to exempt whole classes of transportation from some or almost all of the statutory obligations imposed on carriers. *See* 49 U.S.C. § 10502(a) (directing Board to exempt persons, classes of persons, and transactions from regulation that is "not necessary to carry out the transportation policy of section 10101 of this title" if the transaction is "of limited scope" or regulation is "not needed to protect shippers from the abuse of market power"). Shipments exempted from regulation under § 10502 are not eligible for common-carrier service, so shippers and carriers must negotiate contractual rates and terms.

3. The STB has exempted multimodal transportation under its § 10502 authority

The Board has exercised its authority under § 10502 to exempt multimodal transportation such as the transportation at issue here from common-carrier regulations. Specifically, the Board has exempted "from the requirements of 49 U.S.C. subtitle IV," 49 C.F.R. § 1090.2 — that is, the statutes governing interstate transportation — "the transportation by

rail, in interstate or foreign commerce, of . . . [a]ny freight-laden intermodal container comparable in dimensions to a highway truck, trailer, or semitrailer and designed to be transported by more than one mode of transportation," *id.* § 1090.1(a)(4), when that transportation is "provided by a rail carrier . . . as part of a continuous intermodal freight movement," *id.* § 1090.2. Section 10709 is part of subtitle IV of Title 49 and is thus covered by the Board's exemption. Accordingly, rail carriers providing multimodal transportation need not comply with the common-carrier requirements of that subtitle, but also may not enter into contracts under § 10709.

Because the transportation at issue here was exempt from § 10709, petitioners could not enter into a contract under that provision, as the United States and the Ninth Circuit explained. U.S. Br. 31; Pet. App. 32a. The Board itself interprets the exemption that way. In a recent letter brief responding to the Second Circuit's request for its views, the Board explained that "the language of the . . . exemption regulations exempts rail carriers from section 10709"; therefore, "traffic covered by current agency exemptions under section 10502 cannot also be the subject of a section 10709 contract." STB Letter Br. at 4, *Mitsui Sumitomo Ins. Co. v. Evergreen Marine Corp.*, No. 08-5184-cv (2d Cir. filed Jan. 6, 2010); *see also id.* at 5 (agreeing "with the outcome reached by the Ninth Circuit in *Regal-Beloit*"). The Board's interpretation of the exemption is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted). Here, its interpretation is wholly consistent with the regulation's plain terms.

Although the Board's exemption applies to § 10709, it does not exempt carriers from the Carmack Amendment. The STB limited the exemption expressly, in accordance with § 10502(e). *See* 49 C.F.R. § 1090.2; *see also* Clarification of Notice of Final Rule, *Carriers Involved in the Intermodal Movement of Containerized Freight*, 46 Fed. Reg. 32,257, 32,257 (June 22, 1981) (emphasizing that exemption "does not relieve the railroads from the provisions of [the Carmack Amendment], concerning their liability for loss and damage"). Thus, as the Ninth Circuit correctly recognized, and as the United States explains here, carriers providing exempt multimodal transportation must "offer Carmack protections before they can successfully contract for alternative terms." Pet. App. 32a-33a; *see* U.S. Br. 30 ("Under Section 10502(e), a rail carrier providing exempt transportation must offer the shipper the option of contractual terms for liability and claims consistent with Carmack . . . and may enter into a contract with different terms only if the shipper does not select that option."); *see also Sompo*, 456 F.3d at 60 (collecting cases); *Tokio Marine & Fire Ins. Co. v. Amato Motors, Inc.*, 996 F.2d 874, 879 (7th Cir. 1993); *American Trucking Ass'ns, Inc. v. ICC*, 656 F.2d 1115, 1124 (5th Cir. Unit A Sept. 1981).

4. Union Pacific's proffered reasons for applying § 10709 to exempt transportation are unpersuasive

a. Union Pacific first insists (at 42-43) that exempt transportation remains subject to the STB's jurisdiction and therefore is eligible for a § 10709 contract. It relies on § 10709(a), which authorizes contracts by "rail carriers providing transportation subject to the jurisdiction of the Board." But the

existence of Board jurisdiction is beside the point, because the Board has exempted multimodal transportation from § 10709. Union Pacific cannot rely on the general reference to STB jurisdiction in § 10709(a) to negate a statutorily authorized regulation rendering that entire section inapplicable.

Union Pacific attempts to obfuscate the clear language of § 10502 and the Board's exemption regulation by caricaturing (and then attacking) the Ninth Circuit's opinion. It claims that the court "held" that exempt shipments are permanently removed from the Board's statutory jurisdiction. *See* U.P. Br. 42. Union Pacific fails to quote or cite specific language anywhere in the Ninth Circuit's opinion for that supposed "holding"; in fact, the court held no such thing. Instead, it explained that "[t]he Board's exemption removed [multimodal] transportation 'from the requirements of 49 U.S.C. subtitle IV,'" which "includes § 10709." Pet. App. 32a. The court accordingly held that "a carrier providing nonexempt transportation may contract under § 10709 without offering Carmack protections, but a carrier providing exempt transportation must proceed under § 10502, which does require such an offer." *Id.* at 32a-33a. Union Pacific's argument that the Board cannot abrogate its statutory jurisdiction is therefore a non sequitur. The Board plainly has authority to exempt transportation from statutory provisions, including § 10709. *See* 49 U.S.C. § 10502(a). When it has done so, as it has here, that exempt transportation cannot be the subject of a § 10709 contract.

b. Union Pacific also argues that its proposed construction of § 10709, under which carriers could contract around the obligation to offer Carmack-compliant terms, would not, as the Ninth Circuit

found, strip § 10502(e) of any meaning. *See* Pet. App. 31a-32a. Union Pacific speculates that § 10502(e) only "states a limit on the legal effect of an STB exemption order," without limiting "the contractual freedom of the shipping parties." U.P. Br. 43.

The statute refutes that contention, however. Section 10502 refers to a carrier's "*obligation* to provide contractual terms for liability and claims which are consistent with" the Carmack Amendment. 49 U.S.C. § 10502(e) (emphasis added). As that statutory language reflects, the default regime is the Carmack Amendment, not unregulated "contractual freedom." Congress also provided that, notwithstanding the Board's lack of authority to exempt carriage from the Carmack Amendment, carriers would still be permitted to "offer[] alternative terms" to shippers of exempt transportation. *Id.* That language makes sense only if the carrier's preferred terms are an *alternative* to Carmack-compliant terms. If the only terms offered are non-Carmack terms, those terms are not an "alternative" to anything.

Furthermore, Union Pacific's proposition conflicts with § 10502(e)'s purpose. The statute aims to ensure that, like shippers of nonexempt (regulated) transportation, shippers of exempt (unregulated) transportation have an opportunity to select Carmack Amendment protections before agreeing to alternative terms. *See* U.S. Br. 31-32 (elaborating on "important policy considerations" that "STB's interpretation . . . advances"). Union Pacific's reading of § 10709 would undermine Congress's intent by depriving shippers in exempt carriage situations of that guarantee and allowing carriers to force shippers into limited liability and claims terms without offering

them any opportunity to select Carmack Amendment protections. As one court opined:

> It would be nonsensical for (1) § 10502 to permit a certain category of rail contracts to offer specific rates and terms but require an initial offer of full Carmack liability and (2) § 10709 to permit the *same category of rail contracts* to offer specific rates and terms with no such requirement of an initial offer of full Carmack liability.

Sompo Japan Ins. Co. v. Norfolk S. Ry. Co., 540 F. Supp. 2d 486, 499 (S.D.N.Y. 2008), *quoted in* Pet. App. 31a-32a and U.S. Br. 32.

c. Finally, Union Pacific's argument also misapprehends the functional differences between § 10502(e) and § 10709. As the United States explains, "Section 10502(e) specifies contractual terms that the carrier must offer before a contract for carriage is made, whereas Section 10709 specifies the effect of such a contract after it has been executed." U.S. Br. 30. Put differently, under the Carmack Amendment and § 10502(e), a transportation contract inconsistent with Carmack is not valid if the carrier did not first offer the shipper Carmack-compliant terms. Section 10709 does not relieve carriers from the obligation to offer Carmack-compliant terms before contracting; instead, it establishes the rights and duties of parties under valid contracts that already have been made. In effect, Union Pacific's position is that carriers can avoid a statutory precondition for contractual validity by employing special terms in the contract itself. Nothing in the statute supports such an illogical interpretation. And the history of the provision offers no support for the notion that railroads — whose contractual abuses had led to the Carmack Amendment in the first place — could use

their contractual power to avoid the statutory preconditions for their exercise of those contractual rights.

In sum, nothing in § 10709 relieved petitioners of the obligation under the Carmack Amendment and § 10502(e) to offer respondents terms for liability and claims that were consistent with § 11706's basic liability and terms regime.

B. Petitioners Failed To Offer The Shippers Carmack-Compliant Terms Under § 10502(e)

1. Petitioners were required to offer the shippers a fair opportunity to select a forum specified by the Carmack Amendment

Section 10502(e) prohibits the STB from issuing an exemption order that "operate[s] to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706," *i.e.*, the Carmack Amendment. 49 U.S.C. § 10502(e). That section also permits, however, carriers providing exempt transportation to "offer[] alternative terms," *id.*, and thereby to provide alternative provisions by contract other than the Carmack Amendment's specific terms.

To comply with § 10502(e), petitioners were required to offer *the shippers* contract terms for liability and claims that were consistent with the Carmack Amendment. *See* Pet. App. 32a; *Sompo*, 456 F.3d at 75; *supra* p. 62 (collecting authorities). In an analogous case, this Court articulated the applicable standard. In *Nothnagle*, a railroad sought to limit its liability for losing baggage that a passenger had checked through the carrier's redcap service. *See* 346 U.S. at 129. The railroad relied on a provision in its filed tariff limiting liability for baggage handled

by redcaps to $25 unless the passenger declared a greater value in writing and paid an additional charge. *See id.* at 133-34. Although the Court found that the tariff properly spelled out a graduated rate scheme, it nonetheless held the railroad to full liability because the passenger was inadequately apprised of her rights under that rate schedule. *See id.* at 135-36. "[O]nly by granting its customers *a fair opportunity* to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained." *Id.* (emphasis added). "Binding respondent by a limitation which she had no reasonable opportunity to discover would effectively deprive her of the requisite choice." *Id.* at 135-36.[24]

The courts of appeals have elaborated on the "fair opportunity" principle announced in *Nothnagle* and how it applies in the commercial context. They require carriers to show that the shipper was presented with a written agreement containing a space to enter the declared value of the shipment (and thereby select full-value liability terms) or clear instructions for how to do so through a separate document.[25] *See*,

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[24] The *Nothnagle* Court construed the provision of the Carmack Amendment now found in § 11706(c)(3)(A), which permits a rail carrier to "establish rates for transportation of property under which the liability of the rail carrier for such property is limited to a value established by written declaration of the shipper or by written agreement between the shipper and the carrier." 49 U.S.C. § 11706(c)(3)(A). There is no sound basis to construe § 10502(e)'s language preserving the ability to "offer[] alternative terms" differently. *Id.* § 10502(e).

[25] To be sure, what constitutes a "fair opportunity to choose" may vary with the sophistication of the shipper and its relation to the carrier. But the "fair opportunity" requirement ensures

e.g., *Sassy Doll Creations, Inc. v. Watkins Motor Lines, Inc.*, 331 F.3d 834, 842 (11th Cir. 2003); *Hollingsworth & Vose Co. v. A-P-A Transp. Corp.*, 158 F.3d 617, 621 (1st Cir. 1998); *Toledo Ticket Co. v. Roadway Express, Inc.*, 133 F.3d 439, 443 (6th Cir. 1998); *Hughes Aircraft Co. v. North Am. Van Lines, Inc.*, 970 F.2d 609, 612 (9th Cir. 1992); *Carmana Designs Ltd. v. North Am. Van Lines Inc.*, 943 F.2d 316, 321 (3d Cir. 1991); *Yamazen U.S.A., Inc. v. Chicago & Nw. Transp. Co.*, 790 F.2d 621, 623 (7th Cir. 1986).

Thus, for petitioners to establish that they gave the shippers a "fair opportunity" to select a forum for suit consistent with the Carmack Amendment's venue provisions, 49 U.S.C. § 11706(d), they must show something in the written agreements between the parties indicating that option was available and allowing the shippers to select it.

2. This Court should affirm the Ninth Circuit's remand for a determination whether petitioners complied with the fair opportunity requirement

The Ninth Circuit characterized the record on this issue as a "factual morass" and left the question to the district court on remand. Pet. App. 34a-35a & n.22. This Court should follow the same course. *See*,

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that § 10502(e)'s obligation to offer Carmack-compliant terms remains a meaningful one. *See, e.g.*, Pet. App. 31a n.20 (court of appeals "particularly troubled" by suggestion that carriers could satisfy § 10502(e) through language "buried within several layers of incorporated text, of which the shipper had no direct knowledge"); *Sompo*, 540 F. Supp. 2d at 500 (expressing concern that shippers might not be "on actual notice of either the [Intermodal Transportation Agreements] or the rail carrier circulars or have the opportunity to review them" and that there were "too many steps incorporated by reference to properly charge the shippers with notice of their terms").

e.g., *NCAA v. Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below."); *United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998) ("Not only would we be deciding in the first instance an issue on which the trial and appellate courts did not focus, but the very fact that the District Court did not see the case as we do suggests that there may be still more to be known about [the relevant facts].").

The record here is unduly complicated for final resolution by this Court, and petitioners make no serious effort to clarify it in their briefs. At least three different agreements covered each of the shipments at issue in these cases; several provisions of those agreements set out conflicting requirements; and neither the interaction among the agreements nor the shippers' awareness of each of them is clear from the record. *See* Pet. App. 34a-35a & n.22. For instance, two of the agreements contain conflicting forum-selection clauses. Union Pacific's MITA provides for suit in Nebraska (JA134), whereas K-Line's bills of lading require disputes to be brought in Japan (JA155). The ERTA governing the relationship between Union Pacific and K-Line incorporated the MITA's provisions, but it is unclear whether the Nebraska forum-selection clause is part of that incorporation. *See* Pet. App. 34a n.22. Union Pacific claims the benefit of all provisions in the ERTA and the bills of lading, *see* U.P. Br. 46 n.10, but neither it nor any of the written agreements establish which provision governs if there is a conflict — as there may well be between the two forum-selection clauses. Although Union Pacific contends that those facts are "irrelevant," *id.*, whether § 10502(e) was satisfied depends on them, because the critical question is which

terms the shippers had a meaningful opportunity to select.

3. Petitioners failed to show any offer of Carmack-compliant terms to the shippers

If the Court reaches this issue, however, the existing record reveals no offer of Carmack-compliant terms to the shippers. Petitioners bear the burden of proving that they complied with that requirement. *See Hughes*, 970 F.2d at 612; *Carmana*, 943 F.2d at 319. They have not met their burden.

The Carmack Amendment provides for venue "in a district court of the United States or in a State court." 49 U.S.C. § 11706(d)(1).[26] That court must be located in a judicial district encompassing the point of origin, the plaintiff's principal place of business, the destination of the cargo, or the place where the cargo was damaged. *Id.* § 11706(d)(2)(A)(i)-(iii). Here, none of those locations is Japan. *See* Pet. App. 2a n.1.

Neither Union Pacific nor K-Line claims to have offered the shippers the choice of a forum-selection clause compliant with the Carmack Amendment's venue provisions (or a contract with no forum-selection clause). Indeed, Union Pacific cites no direct contact with any of the shippers at all. It purports to rely instead on terms it offered to K-Line.

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[26] This provision applies to "[a] civil action under [the Carmack Amendment]." 49 U.S.C. § 11706(d)(1). Courts have recognized that a suit by an exempt shipper, even one that accepted a carrier's offer of alternative terms, is a suit "under the Carmack Amendment" by virtue of § 10502(e). *Tokio Marine*, 996 F.2d at 879; *see also Schoenmann Produce Co. v. Burlington N. & S.F. Ry. Co.*, 420 F. Supp. 2d 757, 762 (S.D. Tex. 2006).

See U.P. Br. 44. For the reasons explained in Part II.B.4 below, that indirect offer is not enough.

For its part, K-Line offered shippers only the Japan forum-selection clause contained in its bills of lading, JA155, which is not consistent with the venue requirements established under the Carmack Amendment. Union Pacific points out that the bills of lading authorized K-Line to subcontract for inland carriage "on any terms whatsoever." U.P. Br. 49; *see* JA145. But that bare statement did not give shippers a "fair opportunity" to select the venue terms spelled out in § 11706(d). It does not mention venue (or the Carmack Amendment) at all, let alone provide meaningful instructions for how shippers can request the protections of that statute.

Because neither petitioner complied with the obligation contained in § 10502(e) to offer shippers a choice of Carmack-compliant venue terms, the Japan forum-selection clause in the bills of lading is unenforceable.

4. Union Pacific cannot meet its obligation under § 10502 through terms offered to K-Line

Union Pacific argues (at 44) that it satisfied the requirements of § 10502(e) by giving K-Line the opportunity to select Carmack Amendment protections. But providing that choice to the carrier with which the shippers contracted does not give the *shipper* a "fair opportunity" to make a deliberate choice as to whether it is willing to sacrifice Carmack Amendment protections for a more favorable carriage rate.

Union Pacific offers up a range of arguments purporting to justify its failure to comply with the Carmack Amendment and § 10502(e). First, it protests the supposed unfairness or unworkability of requir-

ing rail carriers to ensure that shippers of multimodal transportation are offered Carmack Amendment protections for cargo transported on Union Pacific trains in the United States, either directly or by the originating carrier. It asserts that, under *Kirby*, "a railroad is entitled to treat its direct counterparty as the shipper, and not look behind whether that counterparty is the original cargo owner or instead a shipping intermediary." U.P. Br. 46. It then claims that a contrary rule would be "completely impractical," because "[t]he railroad may have no idea who the ultimate shippers were, and no practical way to locate them." *Id.* at 48.

Union Pacific's arguments are unavailing. This Court long ago made clear that a railroad cannot avoid the requirements of the Carmack Amendment without first offering its protections *to the shipper*. In *Burke*, this Court considered a multimodal shipment under a through bill of lading. An ocean carrier transported cargo from Yokohama, Japan, to San Francisco, California, where it turned over the cargo for rail transportation to New York. While in the possession of Union Pacific, the cargo was destroyed in a train collision. *See* 255 U.S. at 318. In a suit brought by the shipper, Union Pacific sought to limit its liability to the value declared by the shipper in the through bill of lading. The Court held that it could not do so, because the shipper was never given an opportunity — by Union Pacific or the ocean carrier — to choose between a lower rate for carriage (with limited liability) and a higher rate (with full liability). *See id.* at 323 ("To allow the contention of the petitioner would permit carriers to contract for partial exemption from the results of their own negligence without giving to shippers any compensating

privilege."). The Court did not look to whether the railroad offered such a choice to the ocean carrier with whom it contracted. The question was only what choice the shipper had been given. *Burke* makes clear that the requisite offer of Carmack-compliant terms must be given to the shipper, not by the railroad to an intermediary.

Kirby does not conflict with *Burke*, because the Court in *Kirby* had no occasion to consider the requirements of the Carmack Amendment. No party argued that the Carmack Amendment applied. Thus, the Court did not address the effect of the Carmack Amendment on its holding that intermediaries act as agents of shippers "for a *single, limited* purpose." *Kirby*, 543 U.S. at 34.

Nor does *Kirby sub silentio* control these cases. The Court had no reason to consider the proper rule regarding forum-selection clauses and whether a negligent railroad in a U.S. train derailment in the United States could force a U.S. cargo interest to bring a claim in Japan for the railroad's damage to the cargo. The Court stressed that its decision was only about *liability* limitations. *See id.* Moreover, it based its selection of a rule for those liability limitations — which it characterized as "a close call," *id.* — on the potential for a contrary decision to produce higher rates and on the ability of shippers to recover damages from their intermediaries. *See id.* at 35. Neither rationale applies to forum-selection clauses. Union Pacific does not argue that it would have to charge higher rates to compensate for subjecting itself to suit in the particular U.S. forums specified in § 11706(d). Indeed, Union Pacific's own forum-selection clause provides for suit in the United States, not Japan. Nor could a right to sue K-Line

in Japan make the shippers whole for the inability to pursue relief against Union Pacific in the United States.

Union Pacific's effort to enforce a forum-selection clause that conflicts with its own demonstrates the inconsistency of its arguments in these cases. It initially argued that *New York* was the proper venue, *see supra* p. 16, and only later joined K-Line's motion for dismissal on the ground that Japan was the proper forum. *See* Pet. App. 36a. Further, at the same time as it seeks to enforce K-Line's bills of lading, Union Pacific claims it need not bear the burden of ensuring that the forum-selection clauses in those bills were validly obtained in compliance with § 10502(e)'s requirement that the carrier offer the shipper Carmack Amendment venue terms.

Union Pacific's hypocrisy does not end there. The railroad's basis for arguing that the Carmack Amendment does not apply here is that the underlying shipments moved only under the through bills of lading issued by K-Line and that the contracts between Union Pacific and K-Line are of no moment. *See* U.P. Br. 16, 32-34. But Union Pacific then argues that those Union Pacific/K-Line contracts are all that matter when the Court turns to consider whether there was a proper offer of Carmack Amendment terms. If the application of the Carmack Amendment turns solely on the K-Line through bills of lading, as Union Pacific insists, then the choice of Carmack Amendment terms also must be offered to the shippers under those K-Line bills. Yet those documents contain no support for the notion that the shippers received a choice of Carmack Amendment terms. Union Pacific cannot have it both ways.

Union Pacific offers the fallback position that it is "impractical" to burden it with the consequences of K-Line's failure to offer the shippers Carmack Amendment terms. That contention is neither germane nor compelling. To begin with, Union Pacific's complaint — which railroads have asserted unsuccessfully for more than a century — is properly directed to Congress, not this Court. Union Pacific states that it transports "containers that were sealed on the other side of the world and may contain goods aggregated for efficiency by intermediaries from many different cargo owners." U.P. Br. 48. It claims that it has no practical way of tracking down these multiple shippers. But Congress enacted the Carmack Amendment in response to the difficulty *shippers* faced in trying to determine which of the many rail carriers involved in a shipment damaged their cargo. *See Missouri, K. & T. Ry.*, 244 U.S. at 387; *Atlantic Coast Line*, 219 U.S. at 200. And Congress expressly chose to make *each carrier* — not only carriers in direct contact with the shipper but *any* carrier that transported the cargo — accountable under the Carmack Amendment for the cargo damage. *See* 49 U.S.C. § 11706(a). Thus, Congress determined that, as between a negligent carrier and a shipper of damaged cargo, the carrier should bear the consequences of a failure to offer the shipper Carmack-compliant terms.

Union Pacific compounds the error of its double standard by then overstating the magnitude of the problem it hypothesizes. The U.S. government recently has implemented measures aimed at improving security by increasing the amount of information that must be displayed on the outside of shipping

containers.[27] Union Pacific separately requires detailed shipment information, including the identities of the actual shipper and the beneficial cargo owner, to be transmitted to it before it accepts multimodal cargo for carriage. *See* Union Pacific Exempt Circular MITA 2-A, Item 230D, http://c02.my.uprr.com/wtp/pricedocs/MITA2BOOK.pdf (eff. Apr. 1, 2008). And carriers can avoid the risk entirely by securing indemnity from the intermediary carrier for any failure to offer terms that comply with the Carmack Amendment. Union Pacific argues that that remedy is insufficient. *See* U.P. Br. 48-49. But, in fact, some railroads already have revised their standard contracts to provide such indemnification. *See* Keane, *US Law — COGSA Limitations and Intermodal Transport*, 192 GARD NEWS at 24 ("Under the revision, the ocean carrier, as the railroad's contract shipper, is obligated to indemnify the railroad if the railroad loses its limitations of liability because the ocean carrier did not put its own shipper on notice of the railroad's liability limitations and Carmack opt out provisions.").

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[27] *See, e.g.*, 46 U.S.C. § 70107(m)(1)(D) (directing Secretary of Homeland Security to "examine or develop . . . improved tags and seals designed for use on shipping containers to track the transportation of the merchandise in such containers"); Final Rule, *Presentation of Vessel Cargo Declaration to Customs Before Cargo Is Laden Aboard Vessel at Foreign Port for Transport to the United States*, 67 Fed. Reg. 66,318 (Oct. 31, 2002) (promulgating stricter rules for advance screening and notification of international cargo shipments bound for United States); U.S. Customs & Border Protection, Dep't of Homeland Security, Form 1302: Inward Cargo Declaration, http://forms.cbp.gov/pdf/CBP_Form_1302.pdf (mandatory inward cargo form requiring carrier or vessel operator to identify each shipper, shipper's address, bill of lading number, container number, and container contents).

5. Even if Union Pacific could satisfy the statute by offering Carmack-compliant terms to K-Line, it did not do so

The forum-selection clause that Union Pacific offered to K-Line in the MITA requires suit to be brought in "a court of competent jurisdiction in Omaha, Douglas County, Nebraska." JA134. That forum is not one of the forums identified by the Carmack Amendment (or the Japan forum set forth in K-Line's bill of lading). *See supra* pp. 14-15, 17.[28]

Union Pacific claims that "the MITA makes clear to the world that UP provides contractual terms consistent with Carmack that shippers may select." U.P. Br. 46 n.10. But it points to nothing in the MITA — or anything else — offering shippers the option of a *forum-selection clause* consistent with the Carmack Amendment. In any event, Union Pacific made no such offer of "terms consistent with Carmack" to the shippers here. In fact, Union Pacific's MITA states the opposite: "Carmack liability coverage is **not** available for any Shipments that originate outside the borders of the United States of America." JA133 (Item 3.2(D)). Any shipper or intermediary presented with that plain statement for shipments originating in China would have no reasonable expectation that Union Pacific was offering Carmack-compliant liability coverage and forum selection as options.

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[28] Union Pacific erroneously implies that respondents are barred from making this argument because they did not discuss it in opposing certiorari. *See* U.P. Br. 44 (citing Sup. Ct. R. 15.2). Rule 15.2 requires a brief in opposition to raise any argument "that bears on what issues properly would be before the Court if certiorari were granted." Respondents do not contest that the issue of petitioners' compliance with § 10502(c) is properly before the Court. Respondents do disagree with petitioners' proposed disposition of that issue.

Union Pacific argues that, despite the unequivocal language of Item 3.2(d) of the MITA, K-Line could have divined that Carmack-compliant terms were available if K-Line had requested a separate bill of lading for the inland portion of the shipment. *See* U.P. Br. 45. Union Pacific points to Item 7.7 of the MITA, which defines "domestic" and "international" shipments for the purpose of setting the applicable rates. JA134-36. Specifically, Item 7.7(B)(3) provides: "Shipments, which are warehoused, processed, re-packaged, etc., prior or subsequent to rail movement will not be considered international traffic and shall be rated as domestic Shipments." JA135.

For several reasons, Item 7.7 of the MITA does not establish that Union Pacific offered K-Line Carmack-compliant terms. First, Item 7.7 does not say that issuing a separate bill of lading, without more, will render a shipment "domestic." Nor does it mention liability for cargo damage, which is discussed in an entirely different section of the MITA. To make the connection between Item 7.7(B)(3) and the ability to obtain Carmack Amendment protections, a shipper or its agent first would have to intuit that the "etc." in Item 7.7(B)(3) included rebilling. Then, it would have to assume that an international shipment "rated as domestic" under Item 7.7(B)(3) would also, by virtue of that rating, acquire a fictional point of origin inside the United States. Such a fiction would avoid the clear effect of Item 3.2(D), which (as noted) prohibits the application of Carmack-compliant terms to international shipments. Given the interpretive leaps of logic necessary, however, that combination of MITA provisions could not have given K-Line — let alone the shippers — a clear indication that the shippers had the option of selecting the

Carmack Amendment's protections or clear instructions on how to do so. *See Nothnagle*, 346 U.S. at 135-36 (requiring rail carrier to give customers "reasonable opportunity to discover" and take advantage of Carmack option).

Further, as Union Pacific points out, to select the abstruse Carmack Amendment "option" in Item 7.7, the shipper would have to accept "significantly" higher rates (above and beyond the rate increase for Carmack terms). U.P. Br. 45 n.9; *see* JA133 (setting Carmack rates at 250% of domestic rates). And it would be deprived of the benefits of through transportation that the United States rightly touts. *See* U.S. Br. 32. As explained above, nothing in the statute requires shippers and their agents to forgo the efficiencies of a through bill of lading to receive Carmack Amendment protection. *See supra* pp. 56-57. Requiring a shipper to navigate the murky path through the MITA identified by Union Pacific, and then to accept such substantial unrelated handicaps, is not a "fair opportunity" to obtain the protections guaranteed by the Carmack Amendment.

Finally, to the extent Union Pacific offered K-Line a "fair opportunity" to choose anything, it did not offer the option of Carmack Amendment *claims* terms. Section 10502(e) requires carriers "to provide contractual terms for liability *and claims* which are consistent with the provisions of section 11706." 49 U.S.C. § 10502(e) (emphasis added). The "terms for . . . claims" in § 11706 include the venue provisions of § 11706(d). The MITA does not mention that part of the Carmack Amendment. Item 3.2 of the MITA is titled "Carmack *Liability*." JA132 (emphasis added). It states that the Carmack Amendment provides "full-value *liability* and other *liability terms*," and

it permits a (domestic) shipper to choose "Carmack *liability* protection" by requesting "full-vaule [sic] (Carmack) *liability* protection." JA132-33 (emphases added). Nowhere are the *claims* protections of the Carmack Amendment — including the venue provisions at issue here — mentioned. Union Pacific utterly fails to give anyone — shippers or their intermediaries — any opportunity to select a Carmack-compliant forum for suit.

III. K-LINE IS A RAIL CARRIER SUBJECT TO THE CARMACK AMENDMENT

K-Line argues that ocean carriers cannot qualify as rail carriers for purposes of the Carmack Amendment. *See* K-Line Br. 22. Yet the statutory provisions defining a "rail carrier" include no such limitation. *See* 49 U.S.C. § 10102(5)-(6), (9). The STB has established that the question of rail carrier status is a functional and "particularly fact-bound" inquiry that turns on the type of transportation provided by the entity at issue. *See Association of P&C Dock Longshoremen v. Pittsburgh & Conneaut Dock Co.*, 8 I.C.C.2d 280, 293 (1992). Because K-Line's actions fall within the broad statutory terms defining a rail carrier subject to the Board's jurisdiction, the Ninth Circuit properly concluded that, in these cases, K-Line acted as a "rail carrier" subject to the Carmack Amendment.[29]

A. The Statute's Plain Language Makes Clear That K-Line Is A Rail Carrier

The Carmack Amendment applies to any "rail carrier providing transportation or service subject to

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[29] If this Court determines that there is insufficient evidence in the record to determine whether K-Line was a rail carrier, it should remand for further factual development.

the jurisdiction of the [STB]." 49 U.S.C. § 11706(a). A "rail carrier" means "a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation." *Id.* § 10102(5). That section in turn defines both "railroad" and "transportation" in broad terms. Specifically, § 10102(6) provides that

> "railroad" includes —
>
> (A) a bridge, car float, lighter, ferry, *and intermodal equipment used by or in connection with a railroad*;
>
> (B) the road used by a rail carrier and owned by it or operated under an agreement; and
>
> (C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation[.]

Id. § 10102(6) (emphasis added). The section further provides that

> "transportation" includes —
>
> (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
>
> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property[.]

Id. § 10102(9).

Finally, the statute defines the STB's jurisdiction, which is coextensive with the Carmack Amendment's reach under § 11706(a), in similarly broad terms. *See id.* § 10501(a)(1). Section 10501 provides in pertinent part:

> Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is —
>
> (A) only by railroad; or
>
> (B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

Id.

In these cases, K-Line issued bills of lading that covered transporting the cargo from ports in China to inland destinations in the midwestern United States. *See* Pet. App. 2a. Those documents left the methods of transportation completely within K-Line's control. *See, e.g.*, JA146. Using its own containers, K-Line shipped the cargo from China to the Port of Long Beach on its own vessels and then provided continuing inland transportation by Union Pacific. *See* Pet. App. 2a-3a; *see also* K-Line Br. 13 ("the Shippers loaded the cargoes in this case into 'K' Line ocean vessel containers").

Under that arrangement, K-Line furnished "railroad transportation" as a "rail carrier" under 49 U.S.C. § 10102(5). K-Line used both its own vessel to carry the goods across the ocean and containers to hold the goods during both the ocean and inland legs. Each of those items is a "vessel, . . . instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail" (*id.* § 10102(9)(A)) and "intermodal equipment used . . . in connection with a

railroad" (*id.* § 10102(6)(A)). And, in arranging for and executing the multimodal shipment using those items, K-Line provided "services related to" (*id.* § 10102(9)(B)) "the movement of . . . property . . . by rail" (*id.* § 10102(9)(A)). K-Line need not own the track on which its containers travel to qualify as a rail carrier. *Cf. American Orient Express Ry. Co. v. Surface Transp. Bd.*, 484 F.3d 554, 556 (D.C. Cir. 2007). Further, the multimodal transportation that K-Line provided plainly falls within the STB's jurisdiction over transportation "by railroad and water, when" — as here — the transportation was under K-Line's "common control, management, or arrangement for a continuous carriage or shipment." 49 U.S.C. § 10501(a)(1)(B).

The STB has employed a similar analysis. It has stated that "[d]etermining rail carrier status is particularly fact-bound." *P&C Dock Longshoremen*, 8 I.C.C.2d at 293. In *P&C Dock Longshoremen*, for example, it held that a dock was a rail carrier because it performed services such as transferring cargo between lake vessels and rail cars at the dock, using tracks and locomotives to transport rail cars, and storage and handling related to the movement of property. *Id.* at 291.

In a recent case, a district court applied the same type of factual analysis to determine that a marine transport corporation (Evergreen) was a rail carrier. *See Mitsui Sumitomo Ins. Co. v. Evergreen Marine Corp.*, 578 F. Supp. 2d 575 (S.D.N.Y. 2008). There, the court noted that the Port of Los Angeles's website advertised Evergreen's container terminal, which was built so Evergreen could engage in "dedicated on-dock rail service." *Id.* at 584. That terminal contained railroad facilities used in connection with the

transfer in transit of shipments carried by Evergreen ships to railroads such as Union Pacific. *Id.* That equipment, in combination with a statement by Union Pacific's Business Director that "Evergreen provides transportation services to its customers, including the services which Union Pacific performs during the rails stage of international intermodal shipments," established that Evergreen was properly characterized as a rail carrier. *Id.*; *cf. Kyodo U.S.A., Inc. v. Cosco N. Am. Inc.*, No. 01-CV-499, 2001 WL 1835158, at *4-*5 (C.D. Cal. July 23, 2001). K-Line similarly meets the statutory requisites of a "rail carrier."

The court of appeals below followed the STB's approach. It looked to K-Line's actual actions to determine that it "engaged in railroad transportation subject to the Board's jurisdiction by providing Plaintiffs with continuous carriage by water and rail, utilizing intermodal equipment in connection with a railroad." Pet. App. 16a. In contrast, K-Line's arguments would lead to the conclusion that no company providing ocean carriage service could ever be a rail carrier under the Carmack Amendment — a result inconsistent with the statute.

B. K-Line's Efforts To Avoid The Carmack Amendment Are Unavailing

1. K-Line argues that it "never offered or promised to provide rail transportation to its customers and is incapable of providing such transportation." K-Line Br. 25.[30] It states that "the Bills of Lading obligate 'K' Line only to somehow get the cargo to the inland destinations by any means 'K' Line chooses."

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[30] K-Line points to nothing in the record to support that assertion.

Id. at 27. Yet K-Line's representations to customers and the world through its own website contradict its position before this Court. On its website, K-Line proclaims:

- That it is a "[s]pecialist[] in vessel, ocean terminal, and double-stack train operations and movement."[31]
- That it has "far reaching infrastructure of vessels, terminals, double-stack trains and containers all dedicated to providing a full range of transportation services."[32]
- That it is "a fully integrated intermodal transportation company."[33]
- And that "[m]ultiple weekly fixed-day sailings between the Pacific Northwest and Southwest and the Pacific Rim as well as weekly fixed day sailings between Europe and the United States East Coast offer direct connections to 'K' Line's exclusive double stack train service covering the United States, Canada and Mexico."[34]

Additionally, like the marine transport company in *Evergreen Marine*, K-Line operates container terminals with on-dock rail service at several U.S. ports, including Long Beach, and advertises its "on-dock DST [Double Stack Train] yard" where

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[31] K-Line website, *available at* http://www.k-line.com (last visited Feb. 9, 2010). The same language was included on its website at the time of the events in these cases. *See* http://web.archive.org/web/20050303171811/http://www.k-line.com (last visited Feb. 9, 2010).

[32] *Id.*

[33] http://www.k-line.com/KAMCorpInfo/K-Line_Profile_and_Services.asp (last visited Feb. 9, 2010).

[34] *Id.*

"containers are loaded onto dedicated trains of 'K' LINE." "K" Line Container Terminals at 14, *at* http://www.kline.co.jp/biz/terminal/pdf/terminal.pdf; *see also* Appellees' Supplemental Excerpts of Record vol. II, Tab 49, at A-22, Case No. 06-56831 (9th Cir. filed Aug. 30, 2007) (ERTA § 14(F)(7), stating Union Pacific services on-dock terminals).

2. The United States argues that a rail carrier is most naturally understood to be an entity that has "'some form of direct involvement in the movement of passengers or property' by railroad." U.S. Br. 24 (quoting *Rexroth Hydraudyne B.V. v. Ocean World Line, Inc.*, 547 F.3d 351, 362 (2d Cir. 2008)). But, as the Ninth Circuit explained in distinguishing *Rexroth* (Pet. App. 15a-16a), that case principally involved whether a so-called non-vessel-operating common carrier — essentially, a middleman that contracted with the shipper and then arranged for ocean and inland carriage — could be considered a "rail carrier," when it had no "contact with the shipped goods or any performance in the carrying of those goods." *Rexroth*, 547 F.3d at 362. Unlike the middleman in *Rexroth*, K-Line was directly involved in the movement of these goods, carrying them in its vessel and in its intermodal containers to the port and transferring those containers to rail cars for delivery to their final destination.[35] For a middleman that has no physical involvement in the move-

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[35] In *Rexroth*, the Second Circuit also applied its holding to a vessel-operating common carrier that performed the ocean leg of the shipment. But the court's implicit conclusion that such carriers cannot be rail carriers is unpersuasive, because the court never explained why the vessel-operating common carrier was not "actively involved in transporting, or 'carrying,' the shipper's cargo." 547 F.3d at 362-63.

ment of the shipper's property, there is no need for a Carmack-type liability regime.

On a similar note, the United States also argues that characterizing K-Line as a rail carrier would make the statute's definition of "freight forwarder" meaningless. *See* U.S. Br. 24. A freight forwarder holds itself out to the general public ("other than as a pipeline, rail, motor, or water carrier") as providing transportation through the use of regulated carriers. *See* 49 U.S.C. § 13102(8). "A freight forwarding company arranges for, coordinates, and facilitates cargo transport, but does not itself transport cargo." *Kirby*, 543 U.S. at 19. *Rexroth* provides an illustration of an entity that would qualify as a freight forwarder but not as a rail carrier: the middleman that contracted for carriage of goods but was not directly involved in "railroad transportation" under the statute.

K-Line, however, did provide railroad transportation services.[36] It took responsibility for the carriage of the cargo from loading to destination and carried the goods in its own multimodal containers to the point where they were loaded on to Union Pacific's rail cars. K-Line performed those services while holding itself out as a "[s]pecialist[] in vessel, ocean terminal, and double-stack train operations and movement" that offered "'K' Line's exclusive double

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[36] The United States also argues (at 24-25) that 49 U.S.C. § 10501(a)(1)(B), which defines the STB's jurisdiction as including 'transportation by rail carrier that is . . . by railroad *and water*," *id.* (emphasis added), should be interpreted to exclude any "water carrier" because a previous version of the statute specified that water carriers were included in the Board's jurisdiction. However, the omission of "water carrier" from this section is best understood to exclude only those water carriers that do not provide common-carrier railroad transportation, *i.e.*, those water carriers that do not also qualify as rail carriers.

stack train service." *Supra* p. 85 & notes 31, 34. A finding that such service constitutes "providing common carrier railroad transportation" under § 10102(5) leaves the definition of "freight forwarder" to cover agents (which enter into contracts on behalf of their principals) and "paper carriers" (which assume the obligation to transport the goods but subcontract with regulated carriers to perform the transportation) — the entities generally included in that definition. *See, e.g., Prima U.S. Inc. v. Panalpina, Inc.*, 223 F.3d 126, 129 (2d Cir. 2000) ("Freight forwarders generally make arrangements for the movement of cargo at the request of clients and are vitally different from carriers, such as vessels, truckers, stevedores or warehouses, which are directly involved in transporting the cargo. Unlike a carrier, a freight forwarder does *not* issue a bill of lading, and is therefore not liable to a shipper for anything that occurs to the goods being shipped.").

3. K-Line also argues (at 28) that recognizing its status as a rail carrier subject to the Carmack Amendment creates a conflict between the jurisdiction of the STB and the jurisdiction of the Federal Martime Commission ("FMC"). The FMC's jurisdiction is not exclusive, however. *See* 46 U.S.C. § 40301. Thus, K-Line cannot plausibly claim that, simply because the FMC exercises regulatory authority over it, its activities cannot be within the Board's jurisdiction.

To be sure, the Board's jurisdiction is exclusive over "transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers." 49 U.S.C. § 10501(b).

But, as the statute's plain language makes clear, the STB's exclusive jurisdiction extends only to those actions that constitute the provision of railroad transportation services in the United States, *see id.* § 10501(a)(2), for only in connection with those activities can an ocean carrier qualify as a rail carrier. Thus, any jurisdictional conflict would arise only as to incidents occurring during the domestic leg of an international, multimodal shipment.[37] More fundamentally, any conflict between the Board's and the FMC's jurisdiction is largely theoretical under current law, because the Board has exempted the transportation at issue here from the regulatory provisions of subtitle IV of Title 49. *See supra* p. 57. Indeed, the "insupportable" filing and reporting burdens to which K-Line points (at 29) are part of that subtitle.[38]

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[37] Courts have recognized that STB jurisdiction, while stated to be exclusive in the statute, was not intended to displace certain regulatory authority that existed prior to the ICCTA's enactment. *See, e.g., Iowa, C. & E. R.R. Corp. v. Washington County*, 384 F.3d 557, 561 (8th Cir. 2004); *Tyrrell v. Norfolk S. Ry. Co.*, 248 F.3d 517, 523 (6th Cir. 2001) (STB jurisdiction under ICCTA did not displace Federal Railroad Administration authority over rail safety regulation).

[38] Both K-Line (at 28) and the United States (at 26) suggest that the Board has acknowledged that it lacks jurisdiction over carriers such as K-Line. In the order on which they rely, however, the Board indicated that it had exempted multimodal transportation provided by such carriers from its regulation. *See Improvement of TOFC/COFC Regulations (Railroad-Affiliated Motor Carriers and Other Motor Carriers)*, 3 I.C.C.2d 869, 883 (1987). Because an agency cannot exempt from regulation an activity over which it lacks jurisdiction, the Board's order weakens, not supports, the positions of K-Line and the United States.

4. K-Line asserts that "Congress has implicitly recognized that Carmack does not apply to through shipments from foreign countries," Br. 27, by providing that suits may be brought against an originating carrier "in the judicial district in which the point of origin is located." 49 U.S.C. § 11706(d)(2)(A)(i). Because the "point of origin" of a through shipment from a foreign country is not "located" in any judicial district in the United States, the theory goes, Congress must not have intended for the Carmack Amendment to apply to such shipments.

That argument ignores that Congress has jurisdiction over a "point of origin" in the United States — not in foreign countries. When, as here, the point of origin of the rail carriage is in the United States, it is logical to construe the venue provision as allowing for suit where the cargo was loaded onto Union Pacific's train. Moreover, the Carmack Amendment's other venue provisions also permit suit to be brought against the delivering carrier in the district where the plaintiff resides or the district where the destination is located or against the carrier alleged to have caused the loss in the district where the loss occurred. *See id.* § 11706(d)(2)(A)(ii)-(iii). Thus, even assuming that the relevant "point of origin" in these cases could somehow be China, rather than Long Beach, the Carmack Amendment plainly provides domestic forums in which actions can be brought to recover for cargo damage.

IV. THESE CASES ARE FUNDAMENTALLY DIFFERENT FROM *KIRBY*

In an effort to obscure what is at stake here, petitioners erroneously contend that these cases are "[j]ust like" *Kirby*. U.P. Br. 2. When this Court decided in *Kirby* that the extension of COGSA to

inland transport under multimodal bills of lading preempted competing state laws, it did not address the applicability of federal laws, such as the Carmack Amendment. Thus, the uniformity principle announced in *Kirby* does not support the result petitioners urge. In fact, upholding a private contractual term (the Japan forum-selection clause) in the face of a federal statute (the Carmack Amendment) would frustrate an explicitly articulated federal policy embodied in a congressional enactment.

In *Kirby*, the Court held that a contractual extension of COGSA's limitation-of-liability provision in a multimodal bill of lading preempted conflicting state law because a contrary result would "undermine the uniformity of general maritime law." 543 U.S. at 28. Neither party raised the applicability of other federal law. The United States recognized as much in its *amicus* brief filed at this Court's invitation at the certiorari stage, noting that "[i]t is unsettled whether the Carmack Amendment applies to land transport under international, multimodal through bills of lading." Brief for the United States as Amicus Curiae at 11, *Kirby*, No. 02-1028 (U.S. filed Nov. 14, 2003).

Kirby differs from these cases in two significant respects. *First*, in *Kirby*, the cargo interests advocated the application of state law, whereas the carrier claimed that a federal statute, COGSA, governed via contractual extension. Here, by contrast, respondents urge the application of a federal statute — the Carmack Amendment — whereas the carriers argue that unregulated private contracts should govern. Although COGSA does not prohibit the forum-selection clauses here, nothing in petitioners' position prevents enforcement of a contractual term inconsistent with COGSA (as in *Altadis*).

Consequently, the principle of uniformity that this Court articulated in *Kirby* supports the cargo interests here, not the carriers. Under petitioners' proposals, suits arising from a single domestic train derailment could be governed by a multitude of different liability regimes with little likelihood of consistent outcomes. *See supra* pp. 45-46. By contrast, the Carmack Amendment provides a nationally uniform regime for the inland portion of multimodal shipments.

Calling K-Line's bills of lading "maritime contracts," as petitioners do (*e.g.*, U.P. Br. 1-2; K-Line Br. 21), does not change that conclusion. This Court has recognized that Congress has the primary authority to determine the substance of maritime law, even in the face of inconsistent judicial doctrine. *See, e.g.*, *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). In *Miles*, the Court addressed whether the parent of a seaman who died could recover for loss of society under the general maritime law. *Id.* at 21-22. The Court held that, even though there was a cause of action for wrongful death under the general maritime law, that cause of action did not include damages for loss of society because Congress in the Jones Act had restricted the types of remedies available to seamen. *Id.* at 32-33. The Court explained that "Congress, in the exercise of its legislative powers, is free to say 'this much and no more.' An admiralty court is not free to go beyond those limits." *Id.* at 24. Here, too, Congress has set limits on the forums to which cargo interests must travel to recover for cargo damage, and the courts are "not free to go beyond those limits." *Id.*

Second, unlike *Kirby*, which concerned a limitation-of-liability provision, these cases involve a forum-

selection clause. That difference is fundamental. In *Kirby*, this Court highlighted the plaintiff's insurance coverage, *see* 543 U.S. at 21, implicitly recognizing the role insurance can play for carriers and cargo interests alike in managing risk in the transportation of goods through the trade-offs between higher carriage rates (and carrier liability for risk) versus lower carriage rates (and greater insurance coverage by cargo owners).

A forum-selection clause raises substantially different considerations. Under petitioners' proposed rule, even small-dollar claims (one of these cases involves only $3,012) must be litigated in Japan. Were this Court to adopt such a forum-selection rule for cases involving multimodal shipments that originate in foreign countries but are damaged in the United States through negligence by domestic carriers, the effect would be functionally to exonerate carriers from liability because the costs of litigating in distant lands are prohibitive for the expected return. Such a result creates a windfall for domestic carriers and unfairness to domestic cargo interests that for more than a century have litigated such claims in U.S. courts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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